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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIVIL ACTION No. 5009

AUTO TRANSPORTS, INC., AND GENERAL MOTORS CORPORATION,

Appellants,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT OR DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12

Pursuant to Supreme Court Rule 12, Paragraph 1, above appellants file this their statement showing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the judgment and decree appealed from herein, as follows:

I

The provisions of the statute believed to sustain appellate jurisdiction are as follows:

By Section 1253 of Title 28 of the United States Code, it is provided:

"Sec. 1253. *Direct appeals from decisions of three-judge courts.* Except as otherwise provided by law,

any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

By Section 1336 of Title 28 of the United States Code, it is provided:

"Sec. 1336. *Interstate Commerce Commission's orders.* Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

By Section 2321 of Title 28 of the United States Code, it is provided:

"Sec. 2321. *Procedure generally; process.* The procedure in the district courts in actions to enforce, suspend, enjoin, annul, or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter." (Chapter 157, Title 28 U. S. Code).

And by Section 2325 of Title 28 of the United States Code, it is provided:

"Sec. 2325. *Injunction; three-judge court required.* An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

II

The judgment and decree appealed from was entered on the 23rd day of November, 1951, and the application for appeal is presented on the 28 day of December, 1951.

III

This action was brought to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission (hereinafter called Commission), issued on May 17, 1950, in a case before that Commission entitled Auto Transports, Inc., Suspension of Permit, Commission Docket No. MC-C-1107, suspending the right of appellant, Auto Transports, Inc., to operate as a contract motor carrier under a permit issued to it in Commission Docket No. MC-106553.

The order was issued pursuant to Section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)) for an alleged failure to comply with the provisions of Section 218(a) of the Interstate Commerce Act (49 U.S.C. 318(a)) and the requirements of Commission Tariff Circular MF-2 and supplements thereto, issued by the Commission, all with respect to the publication, keeping open for public inspection, and filing with the Commission of the minimum rates and charges actually maintained and charged for the transportation of property in interstate commerce.

All administrative remedies provided by Part II of the Interstate Commerce Act, (49 U.S.C., Sec. 301, et seq.) of which the above referred to sections are a part, had been exhausted before this action was instituted.

By Section 205(g) of the Interstate Commerce Act (49 U.S.C. 305(g)), it is provided:

> "Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of

the Commission made under Chapter 1 of this title: *Provided,* That where the Commission, in respect of any matter arising under this Chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under Section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

By Section 205 (h) of the Interstate Commerce Act (49 U.S.C., sec. 305(h)), it is provided:

"All the provisions of section 17 of this title shall apply to all proceedings under this Chaper."

And by Section 17(9) of the act (49 U.S.C., sec. 17(9)), it is provided:

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a Division, an individual Commissioner, or a Board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

Pursuant, therefore, to the foregoing Sections of Title 49, and to Sections 1336, 2281-2284, and 2321-2325 of Title 28, United States Code, this action was brought to set aside and enjoin the enforcement of an order of the Commission after all administrative remedies had been exhausted. The matter was heard by a three-judge District Court.

The majority opinion of the three-judge District Court approved the order of the Commission issued on May 17, 1950, and denied appellant's application to set it aside and enjoin its enforcement.

IV

Cases relied upon and believed to sustain jurisdiction are as follows:

Interstate Commerce Commission vs. Hoboken Manufacturers R. Company, 1943, 64 S. Ct. 159, 320 U. S. 368, 88 L. Ed. 107, Rehearing denied 64 S. Ct. 516, 321 U. S. 801, 88 L. Ed. 1088.

U. S. vs. Hancock Truck Lines, 1945, 65 S. Ct. 1003, 324 U. S. 774, 89 L. Ed. 1357.

V

Pursuant to an application filed by appellant, Auto Transports, Inc., with the Commission in July, 1947, the Commission issued an order in Docket No. MC-106553, authorizing the issuance of a contract carrier's permit to said appellant upon compliance with the terms of the order.

One of the terms of that order was that appellant, Auto Transports, Inc., comply with the provisions of Section 318, Title 49, U. S. Code, which provides that every contract carrier by motor vehicle shall file with the Commission, publish and keep open for public inspection in the form and manner prescribed by the Commission, schedules containing the minimum rates and charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce.

Complying with the terms of said order appellant, Auto Transports, Inc., filed and published a schedule of minimum rates and charges as required by Section 318, Title 49, and filed with the Commission a true copy of its contract which it had entered into with appellant, General Motors

Corporation, *its only shipper* (hereinafter called General Motors), as required by the provisions of Section 320, Title 49.

On August 27, 1947, the permit here involved was issued, and continuously since such date appellant, Auto Transports, Inc., has been operating thereunder; and it has invested substantial sums in facilities and equipment, and has as well built up and maintained an organization of approximately 300 persons which would permit it to adequately and satisfactorily fulfill the terms of its contract with General Motors.

The minimum rates and charges set forth in the schedule filed and published by the appellant, Auto Transports, Inc., prior to issuance of the permit on August 27, 1947, have not been changed since such schedule was filed and published. The minimum rates and charges reflected by the schedule when filed were the same transportation charges reflected by the contract then in existence between appellant, Auto Transports, Inc., and General Motors, and such were the transportation charges collected until the contract was subsequently revised increasing the rates and charges.

In accordance with the provisions of Section 320, Title 49, U. S. Code, and Rules and Regulations promulgated by the Commission, appellant, Auto Transports, Inc., from time to time since the issuance of its permit, has revised, amended and modified its contract with General Motors so as to increase the rates and charges for authorized transportation service.

Such amendments to or revisions of the contract as originally filed had always been presented to and accepted by the Commission without question until a further amendment and revision was presented to the Commission in November, 1948.

At that time the Commission took the position that

where a contract carrier was contracting with only one shipper the minimum rates and charges reflected by its published schedule should be at all times identically the same as the rates and charges reflected by its contract and all revisions thereof, as and when made.

Section 320, under which said contract and all revisions or modifications thereof were filed, provides that the Commission shall not make the same public, except under certain conditions not here involved.

The Commission, in its order of May 17, 1950, suspended the right of appellant, Auto Transports, Inc., to engage in the transportation authorized in its permit because said appellant refused to revise its schedule of minimum rates and charges upward so that the rates and charges published therein would be the same as those provided for in its contract and the revisions and modifications thereof.

Therefore, the question here involved is whether or not the Commission can require a contract carrier to file and publish a schedule of minimum rates and charges containing the rates and charges the same as those provided for in its contract each time the contract rates and charges are changed by agreement between the carrier and its shipper, even though such contract rates and charges at all times are in excess of the rates and charges reflected in its published schedule of minimum rates and charges.

The order of the Commission and the decision of the majority of the court below are apparently *contra* to the thinking of this court as reflected by denial of petition for certiorari in *Gustave Betterman* v. *American Stores Company*, 80 A. (2d) 66 (Pa. Sup.) Certiorari denied, Case No. 190, Oct. 8, 1951, 96 L. Ed. 32.

One reason this question is substantial, is that if the Commission can, as it claims authority so to do under section 318(a), require a contract carrier with a contract with

only one shipper, as is the case here, to file and publish a schedule of minimum rates and charges containing rates and charges which are the same as those contained in its contract, and to amend said schedule each time the contract rates and charges are changed, the result would be that the said contract rates and charges would be made public contrary to the provisions of Sec. 320, Title 49, which prohibits the Commission from making public any contract between a contract carrier and a shipper. Obviously, such was not the Congressional intent.

This question is substantial for the further reason that the operations, contracts, schedules and permits of all contract carriers are involved.

Furthermore, the regulations of the Commission relating to filing schedules of minimum rates and charges, (Rules 49 C. F. R. 187.8(b)), provide that no change may be made in published schedules of minimum rates and charges of contract carriers except on 30 days notice. They also require that in the filing of such schedules copies of the contracts involved in the particular operation must be filed at the same time. As to the filing of subsequent contracts, or amendments or revisions of a prior existing contract, however, the regulations permit the filing of such contracts, or amendments or revisions within 20 days after they become effective.

The requirement as made by the Commission in this case would therefore destroy the flexibility and freedom of contract. This is one of the inherent advantages of contract carriage, inasmuch as no waiting time is required for the parties to enter into new contracts, or amendments or revisions of an existing contract as circumstances may immediately warrant, provided the resulting rates and charges are not lower than the rates and charges shown in the car-

rier's published schedule of minimum rates and charges on file with the Commission.

Also in the event a shipper and a carrier should agree that the costs of the carrier have increased or decreased to the extent that an adjustment in the rates and charges is justified or necessary, such adjustment could not be put into effect, under the Commission's order here, except by filing a revised schedule of minimum rates and charges effective not sooner than the expiration of a period of 30 days after filing. Under the power of the Commission to suspend a schedule it might not become effective for a period of seven months (Sec. 318).

This question is substantial for the further reason that with the Commission having the power to suspend or reject a minimum schedule, as it does a tariff of common carriers, such a requirement would destroy the distinct different standards of rate regulation applicable to contract carriers by motor vehicle on the one hand and common carriers by motor vehicle on the other, contrary to and in derogation of the national transportation policy as enunciated by the Congress. This is best illustrated by the statutory requirement that common carriers by motor vehicle must file tariffs, on 30 days notice, containing the exact rates to be charged, with the further requirement that no "greater or less or different compensation" shall be charged than that provided for in such tariffs (Sec. 317). On the other hand, contract carriers by motor vehicle are merely required to file a schedule of "minimum" rates and charges, on 30 days notice only with respect to reductions in such schedules, with the added requirement that the contract carrier shall not charge or collect "less compensation" than that provided for in its schedule of minimum rates.

Also, such a requirement would result in discriminatory subclassifications of contract carriers. Examples of this

would be: (1) The case of a contract carrier with two or more shippers, and therefore with two or more contracts. Such a contract carrier would be required to publish and file with the Commission a schedule of minimum rates and charges corresponding to the rates and charges reflected in only one of its contracts. Thereafter such a contract carrier would be free to contract with any or all of its shippers at any time for rates and charges equal to or in excess of the rates and charges in its published schedule of minimum rates and charges and to make such changes in its rates and charges immediately effective. All that such carrier would be required to do would be to file with the Commission copies of such contracts within 20 days after their effective date, and the Commission would be prohibited from making the same public (Sec. 320; 49 C.F.R., Sec. 173.1). In this example the subclassification of the contract carrier probably would be a multiple shipper contract carrier. (2) The case of a contract carrier with only one shipper. Such a carrier, having only one shipper and therefore only one contract, would be required to seek approval and permission of the Commission to publish schedules of minimum rates and charges each time its rates and charges were changed by modification or change in its contract with its shipper, thus denying to such a carrier the flexibility and freedom of contract enjoyed by a carrier and shipper of the first class mentioned. In this latter example the subclassification of the contract carrier probably would be a one-shipper contract carrier. In the first example the subclassification would give the carrier and the shipper a distinct and substantial advantage, while in the second example the carrier and the shipper would be placed at a distinct and substantial disadvantage. No provision is contained in the Interstate Commerce Act requiring or permitting any such sub-

classifications of contract carriers, or subclassifications of any nature of contract carriers.

Appellants respectfully submit that the Commission erroneously determined that a contract carrier is required to file and publish a schedule of minimum rates and charges containing the same rates and charges as those provided for in its contract, even though such contract rates and charges exceed the rates and charges reflected in its published schedule of minimums, and that the District Court erred in affirming the action of the Commission.

VI

Appellants attach hereto copies of the majority and dissenting opinions handed down by the three-judge court on November 2, 1951, which was followed by the making of findings of fact, conclusions of law and the entry of final judgment and decree on November 23, 1951.

Dated this 28 day of December, 1951.

Respectfully submitted,

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APPENDIX "A"

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judges

MURRAH, *Circuit Judge:*

OPINION

Pursuant to a show cause order dated November 1, 1949, the Interstate Commerce Commission, on May 17, 1950, entered its order suspending Auto Transport's right to operate as a contract motor carrier under its permit issued in MC-106553. After denial of a petition to vacate and reconsider the suspension order, which finally became effective December 15, 1950, Auto Transport brought this action against the United States and the Interstate Commerce Commission pursuant to Section 17(9), Title 49 USC, to set aside and enjoin the enforcement of the order. The General Motors Corporation, Auto Transport's only shipper, intervened in support of the complaint.

This three judge court, as constituted under Section 2284, Title 28, USC, is vested with jurisdiction of the action under Section 1336, Title 28 USC, 62 Stat. 931, and Sections 2321-2325, Title 28 USC.

A temporary restraining order was issued on December 12, 1950, before the final effective date of the suspension order, and by agreement of the parties, has been continued in effect pending disposition of the cause on its merits.

On July 12, 1946, Auto Transport was granted temporary authority to transport new automobiles over irregular routes from points in Wyandotte County, Kansas to designated points in fifteen states. On August 27, 1947, the Commission issued Auto Transport a permit to perform the same service. Concurrently with the issuance of the temporary authority in 1946, Auto entered into a contract with the intervenor, General Motors, providing for the transportation of its new automobiles, automobile cabs and bodies from its plant in Wyandotte County, Kansas, to the designated points in the temporary authority and subsequent permit. The contract, filed with the Commission in accordance with Section 320(a), Title 49 USC, provided for the

rates and charges for the transportation of the automobiles to the designated points. Auto has never had any other contract with any other shipper for the transportation of property under its temporary authority or permit.

Before the commencement of the operation, Auto also filed with the Commission a schedule of minimum rates and charges in accordance with Section 39(a), Title 49 USC. This schedule of minimum rates and charges was the same as those provided in the contract. The schedule of rates has never been revised or amended, but the contract rate has been amended to revise the rates and charges upward from time to time to meet increased cost, so that at the time of the issuance of the show cause order, the contract rates were not the minimum rates actually maintained and charged for the services performed under the permit.

Section 318(a), Title 49 USC, provides in presently material part that "It shall be the duty of every contract carrier * * * to file with the Commission * * * schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce." And, "No such contract carrier, unless otherwise provided by ths chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this chapter."

Before the issuance of the show cause order, and by letter dated December 14, 1948, the Commission called attention to the variance in the scheduled and contract rates and charges, and pointed out that Section 318(a) required a contract carrier by motor vehicle to file and publish a schedule of minimum rates and charges actually maintained and charged any one shipper under its permit; that since General Motors was its only shipper, it was required to file and publish a schedule of minimum rates actually charged General Motors under its contract. And, Auto was accordingly instructed to amend its schedule of minimum rates to conform to the contract rates actually maintained and charged for the transportation performed for its shipper.

When Auto refused to comply, the show cause order was issued. Auto moved to vacate the order, contending that Section 318(a) did not authorize the Commission to require it to revise its published schedule of minimum rates to conform to its contract rates.

In its report, pursuant to which the order of suspension was entered, the Commission referred to a letter dated January 29, 1940, which its legislative committee has transmitted to the appropriate Congressional Committee, calling attention to the fact that "the words 'actually maintained and charged' are not in Section 218(2), and under that subsection, schedules may be filed containing minimum charges which are fictitious, i. e., which never have been and never will be charged. The words thus inserted will make it necessary to include in the schedules the lowest rates, fares and charges which are actually assessed, and hence the schedules will give the competing common or contract carrier adequate notice of the competition by which they are confronted." Our attention is directed to the Congressional conference report on the Transportation Act of 1940. See Rep. 2832, 76th Congress, p. 79, reflecting the views stated in the letter. Then the Commission points to the fact that Section 318(a), as thus amended, became effective on September 18, 1940. It went on to state that since its effective date, the Commission had consistently construed Section 318(a) as requiring contract carriers to file and publish schedules showing the lowest rates or charges actually maintained for the transportation in the carrier's contract; and, imposing upon the Commission the duty of requiring schedules of contract carriers to contain minimum rates and charges actually maintained and charged. And see Shipman Bros. Contract Charges Between California and Iadho, 30 M.C.C. 229; Contract Minimum Charges from and to Baltimore, Md., 32 M.C.C. 273; Petroleum Products from Wyoming Points to Missoula, Mont., 32 M.C.C. 453; In the Matter of Filing of Contracts by Contract Carriers by Motor Vehicle, 41 M.C.C. 572.

The complainant takes the position that this construction of 318(a) cuts across the established transportation policy to recognize and treat common carriers and contract car-

riers by motor vehicle as two Separate classes of transportation, as to each of which distinct and separate standards of rate regulation is applicable. See House Conference Rep. 2832, 76th Congress. Emphasis is laid upon the distinctly different duties imposed upon a common carrier and a contract carrier by the regulatory scheme. As for example, the inflexible duty of a common carrier to establish and maintain reasonable rates and charges, provide adequate service, file and publish tariffs containing such rates and charges which cannot be changed except upon thirty days notice, all of which are subject to revision and regulation by the Commission (Sec. 316-317, 49 USC), whereas a contract carrier is required only to file a schedule of reasonable minimum rates, and is free to contract for any rates or charges above such minimum reasonable rates, subject to change without notice.

The effect of the Commission's order under attack is said to destroy the distinctly different standards of rate regulations applicable to contract and common carriers by motor vehicle, contrary to and in derogation of established transportation policy. Particularly, the ultimate effect of the order is said to require the contract carrier to maintain and charge the exact rates filed and published in its schedule of minimum rates, resulting in a rigidly fixed rate which, under applicable regulations, must be filed and posted at least thirty days prior to the effective date. See Rules 49 C.F.R. 187.8(b).

It is true that the Commission's order has the effect of construing Section 318(a) to require a contract carrier to actually maintains and charges any one shipper, and since Auto has a contract under its permit with only one shipper, the order has the rather anomalous effect of requiring it to actually charge that shipper the rates filed and published in its schedule. In other words, the contract rate must be reasonable minimum scheduled rate, or vice versa. But, this does not prohibit Auto and intervenor from contracting for any rate they choose, so long as they file the schedule showing such rate to be the posted minimum reasonable rate.

Section 318(a) was deliberately amended to remove what the Commission thought was an evil inherent in the dis-

parity between the posted schedule rate and the unpublished contract rate. The order of the Commission is in obedience to the Congressional mandate. If the requirement for posting the schedule of minimum rates at least thirty days prior to the effective date works a hardship, the Commission is authorized to ameliorate it. In any event, the requirement does not destroy the validity of the Commission's order.

Belief is denied and the action is dismissed.

VAUGHT, *Dissenting:*

It is with reluctance that I disagree with my associate judges as to the majority opinion, but my conviction in my position is so firm that I cannot do otherwise.

The majority opinion contains a brief, but I think correct, statement of the facts in this case and it is not necessary to repeat them in this opinion.

There appears to be only one question for determination by this court, i.e., whether or not when a schedule is filed by the contract carrier containing the minimum rates or charges of such carrier actually maintained and charged at the time it is filed, is the carrier then required under the law to file a new schedule each time it revises by contract the rate upward?

An examination of the statute itself becomes necessary. The original statute under consideration, on October 1, 1935, used only this language:

> "It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, *schedules*, or in the discretion of the Commission copies of contracts, *containing the minimum charges* of such carrier of passengers or property in interstate or foreign commerce, * * * (Emphasis supplied.)

It is conceded that under this statute, as then in force, the filing of the minimum rate charged was sufficient to satisfy the statute. It is contended by the defendants, however, that under that statute a contract carrier could file a minimum rate under the schedule of rates which would be a

"fictitious rate," or "paper rate", which would really have no relation to charges received by the carrier, and "which never have been and never will be charged." The 76th Congress, in 1940, amended the statute for the purpose of curing that situation, and the amendment (49 U. S. C. A. Sec. 318(a)), effective September 18, 1940, provided that the schedules must contain "the *minimum rates or charges* of such carrier *actually maintained and charged* for the transportation * * *." (Emphasis supplied.)

A brief reference to the history of this amendment becomes necessary. When the amendment was before Congress, Commissioner Joseph B. Eastman, Chairman of the Commission's Legislative Committee, on January 29, 1940, addressed a letter to the Chairman of the Senate Committee on Interstate Commerce, and the Chairman of the House Committee on Interstate and Foreign Commerce, recommending among other changes in the Motor Carrier Act that Section 218(a) be amended by inserting, after the clause providing that contract carriers shall file with the Commission their schedules of minimum rates, the words, "schedules of minimum rates, fares, or charges actually maintained and charged." The letter also stated that the amendment suggested would preclude "minimum charges which are fictitious, i.e., which never have been and never will be charged." And it is a reasonable conclusion that Congress enacted the amendment in order to require minimum rates which were reasonable. Certain sections of the statute, as amended in 1940, must be considered.

49 U. S. C. A. Section 318(a) reads:

> "It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection,

in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed and posted in accordance with the provisions of this part. No reduction shall be made in any such charge either directly or by means of any change in any rules, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions, * * *"

Section 320(a) reads:

"* * * The commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: Provided, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required

by section 318(a) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof."

It will be noted that the statute covers three propositions: (1) that the contract carrier is required to file with the Commission, publish and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged; (2) that no reduction may be made in any such charge either directly or by means of any change in any rules, regulation or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change; and the 3rd proposition has reference to the actual contract between the contract carrier and the shipper, and the statute provides that the Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement or arrangement between such carrier and any other carrier or person in relation to any traffic affected. *The Commission shall not, however, make public any contract, agreement or arrangement between a contract carrier by motor vehicle and a shipper.*

It will be noted that under the first proposition the schedule containing the minimum rates or charges must be published and kept open for public inspection, and under the third proposition the contract between the carrier and the shipper reflecting the actual rate charged shall not be made public by the Commission.

In the instant case the schedule containing the minimum rates or charges was filed in 1946, and at the same time, the contract between the plaintiff and its shipper also was filed containing the actual rate charged. In this case the rate charged was the same as the minimum rate.

The significant feature of this statute is that it expressly prohibits any reduction below the minimum rate except after thirty days' notice of the proposed change, but nowhere in the Act is there any prohibition of an increase in the charges, so long as the increased charges are higher than the minimum rate.

The plaintiff contends vigorously that since it complied with the portion of the Act requiring it to file a schedule containing its minimum rate, that feature of the statute was complied with, and that since with every change it has made upward, it has filed a copy of the contract showing such changes with the Commission, and therefore that provision of the statute has been met. The defendant, however, contends that in order to meet the statutory requirement with reference to rates or charges actually maintained and charged, the minimum rate contained in the schedule must be the same as the rate actually charged under the contract.

It is admitted by the defendant in oral argument and in its brief that the minimum rate contained in the original schedule filed by the plaintiff in 1946 was a reasonable rate and that it was the rate actually charged at the time. Nowhere in the statute is there any provision that the minimum rate shall be the same as the rate actually charged. If that were the case, why use the word minimum at all? Minimum has a significant meaning, and in this Act the only reasonable construction that can be placed on the word is that it represents the lowest rate which can be charged by the contract carrier, and since the Act provides that no reduction below the minimum rate shall be charged except under certain conditions, and makes no reference whatever to an increased rate by contract, it is not clear upon what basis or theory the government contends that the minimum rate and the rate charged by contract must be the same and in the event a higher rate than the minimum rate by contract is charged, an additional schedule must be filed setting forth the minimum rate as the rate actually charged by contract.

The contentions are inconsistent. Why provide for a schedule of minimum rates if the only rate to be considered by the Commission is the rate shown in the contract? And why are contract carrier and shipper protected from the publicity of their actual contract rate if that rate must be the same as the minimum rate, which is published and kept open to the public for inspection?

This amendment was made in 1940 and this statute must not be confused with that section of the statute that has to do with common carriers. The Commission itself, in proper

orders and rulings, has placed a very different construction upon this statute from that contended for by the government in this case. The Commission, in its 63rd Annual Report to the Congress for the year 1949, after reciting that as to common carriers it has the authority "to prescribe the maximum or minimum rate, or the maximum and minimum, found to be reasonable," states that "as to contract carriers, our power is limited to the prescription of reasonable minimum rates."

In an opinion of Division 2, in Petroleum Products, Wyoming Points to Missoula, Mont., 32 M. C. C. 453, 455 (1942), the Commission, after discussing the tariffs with respect to common carriers, said:

> "A contract carrier's minimum rates, unlike common-carrier rates, do not represent a stated price for which a shipper can demand service. *The minimum rates of contract carriers, are, in fact, not rates at all in the common-carrier sense of the terms. They are simply a floor for the charges actually to be made.*" (Emphasis supplied.)

It was never the legislative intent to destroy any inherent advantages of contract carriers, and Division 5 of the Commission, in 1 M. C. C. 628, states charges of contract carriers "may be called in question only if they are found to fall below a reasonable minimum level." Division 3, in New England M. Rate Bureau, Inc. v. Lewers and McCauley, 30 M. C. C. 651 (1941), quoted the above language of Division 5 relating to that inherent advantage and went on to say:

> "The Congress intended that the minimum charges prescribed should not discourage the free movement of traffic by contract carriers."

In the oral argument, as well as in the brief, the defendant contended that different rates exist if the contract carrier serves two shippers or more than one shipper. The soundness of the argument when it was orally made was not convincing and the argument in the brief is even less so. The defendant has cited a number of district court cases, and while it will be admitted that these are not controlling over

this court, at the same time it may well be observed that they are not in point.

In summing up the situation, therefore, it is apparent that the first requirement by Congress was that the plaintiff should obtain a permit, which it did; second, that it should establish and observe reasonable minimum rates and charges, which it did; third, that it should file with the Commission, publish and keep open for public inspection a schedule of minimum rates and charges, which it did; and, fourth, that it file with the Commission its contract with its shipper in order that the Commission might know the rates which the plaintiff was, in fact, charging, which contract was not open to public inspection, and this the plaintiff did.

The only reasonable conclusion, therefore, to be reached is that when a contract carrier secures its permit, files a schedule showing its minimum rates, and then files a copy of the contract disclosing the actual rates charged the shipper, the statute has been complied with in full. There is no statutory authority for the power asserted by the Commission in directing that a new schedule be filed with each contract, if the contract represents an increased rate. That would destroy the purpose of filing a schedule showing minimum rates, and most certainly it would destroy the protection of the contract carrier and the shipper in keeping from the public the actual rate charged. Such an interpretation as contended for by the government is both arbitrary and capricious.

The injunction should be made permanent.

Endorsed: Filed in District Court Nov. 2, 1951.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIVIL ACTION No. 5009

AUTO TRANSPORTS, INC. COMPLAINANT, AND GENERAL MOTORS CORPORATION, INTERVENING COMPLAINANT

v.

UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on November 23, 1951,[1] by a specially-constituted District Court of three judges convened pursuant to Sections 2284 and 2325, Title 28 of the United States Code, dismissing appellants' complaint seeking to set aside an order of the

[1] The Court rendered its opinion and made findings of fact and conclusions of law on November 2, 1951, with District Judge Vaught dissenting. The opinions are not yet reported.

Interstate Commerce Commission entered May 17, 1950. Appeal was allowed on December 28, 1951. The appeal papers have not been served upon the Interstate Commerce Commission, except that copies of such papers, transmitted by the United States Attorney, were received by the Commission on January 6, 1952.

On July 12, 1946, the Commission granted Appellee, Auto Transports, Inc. temporary authority to transport new automobiles, automobile cabs and bodies, by the drive-away and truck-away methods,[3] in initial movements over irregular routes from points in Wyandotte County, Kansas to points in 15 mid-western and southwestern States, and between points in these States in secondary movements over irregular routes. This authority was made permanent by the issuance of a contract motor carrier permit to the carrier, on August 27, 1947, to perform the same service. Upon receipt of the aforesaid temporary authority appellant carrier entered into a contract with appellant General Motors providing for the transportation of automobiles from its plant in Wyandotte County to designated points in the territory just mentioned. The contract, copies of which were filed with the Commission pursuant to Section 220(a) Part II of the Interstate Commerce

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[3] Drive-away means the car is transported under its own power and on its own wheels. Truck-away means transportation of cars in trailers on tractor-trailer units.

Act (49 USC 320 (a)),[3] provided for rates to 13 specific points on the basis of point-to-point rates per car and to all other points on a mileage basis. Appellant carrier has never had a contract for the transportation of property as a contract carrier with any other shipper than General Motors since it received the aforesaid authority.

Prior to the commencement of its aforesaid contract carriage operations appellant carrier filed with the Commission, as he was required to do under Section 218(a) of the act (49 USC 318(a)),[4]

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[3] Section 220(a) provides in material part as follows: "* * * The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this part. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided*, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by section 218(a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

[4] Section 218(a) provides in part as follows: It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually main-

a schedule of minimum rates and charges containing the minimum rates or charges "actually maintained and charged" for the transportation of property. The schedule of minimum rates and charges, filed as aforesaid, were the same as those contained in the contract. Although the schedule of rates has never been revised or amended the rates and charges contained in the original contract have been increased from time to time, to meet increased costs, until now they are considerably higher than those embraced in the aforesaid schedule [5].

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tained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates, or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this part. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. * * *

[5] At the time an amended and revised contract, dated November 1, 1948, was presented to the Commission, it was examined by Commission officials and found to contain point-to-point rates per car to approximately 1500 destinations (with mileage rates to cover balance of points) all of which were higher than the charges specified in the schedule of minimum rates. This was true notwithstanding the fact that the schedule of minimum rates and charges in MF-ICC No. 1, still on file with the Commission, contains only 13 specific

After persistent and prolonged efforts had been made by the Commission to have appellant carrier correct its schedule of minimum rates, but with no success, the Commission instituted proceedings under the second proviso of Section 212(a) of the act (49 USC 312(a))[6] to suspend its permit until such time as the carrier had filed a schedule "containing the minimum rates or charges of such carrier actually maintained and charged" as required by Section 218(a) quoted in footnote, page 3 *supra*.

The Commission, by Division 5, issued its report on May 17, 1950, pursuant to which the order of suspension, of the same date, was entered.[7] The Commission found that appellant Auto Transports was not in compliance with the requirements of

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point-to-point rates with the balance on a mileage basis all of which rates were lower than those provided by the amendments to the original contract. (Commission's report, p. 2, Exhibit "B" to plaintiff's complaint.)

[6] Section 212(a) provides in material part as follows: Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. * * * *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

[7] 51 MCC 600.

Section 218(a) and its own tariff circular MF-2,[8] and that by reason of such non-compliance "it is not lawfully maintaining a schedule of minimum rates and charges actually maintained and charged * * * as required by Section 218(a) and tariff circular MF-2, and the rules and regulations thereunder.[9]"

The appellants in the Commission proceedings as well as in the District Court contended that the Commission erred in its interpretation of Section 218(a) as requiring a contract carrier (with but a single shipper, such as Auto Transports) who has filed a schedule of minimum rates or charges reflecting the identical rates specified in a contract with the shipper, which contract was subsequently modified by increasing the rates to be charged, to reissue and file with the Commission a revised schedule to reflect the actual rates agreed to and charged in the revised contract. They contended that this interpretation (1) nullifies the confidential nature of motor contract carrier's contracts with a shipper, in violation of Section 220 (a), for

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[8] Rule 7(p), Supplement No. 3 to MF No. 2, published March 18, 1943 (pursuant to Section 204(a)(6)) "Contract Carrier Schedules" provides: *Publication, filing, and posting of schedules*—(a) Schedules must be filed by contract carriers. (1) Contract carriers shall file schedules which conform to these regulations unless otherwise authorized by the Commission. (49 C.F.R. 187.7.) *Tables of Minimum rates or charges.* (1) The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges *actually maintained and charged.* (Emphasis added.) (49 C.F.R. 187.8.)

[9] 51 MCC 600, 604.

the reason that the actual rate charged in the contract is revealed (when the carrier has only one shipper) by the minimum schedule filed with the Commission which is open to public inspection as required by the statute; and (2) destroys the distinction between common and contract carriers, which Congress intended to preserve, particularly as respects the flexibility and freedom of contract and the distinction pertaining to the different standards of rate regulations applicable to such classes of for-hire motor carriers. Appellants cite these matters as constituting the "substantial" question presented for the determination of this Court as stated at pages 8 to 10, inclusive, paragraph V of their jurisdictional statement.

It is submitted that the legislative history of the act supports the Commission's interpretation of Section 218(a). This section as originally enacted required contract carriers to file schedules of only minimum rates and charges and prohibited the charging of a rate less than that contained in his minimum schedule.[10] The Commission soon

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[10] The original motor carrier act (Part II, Interstate Commerce Act), which became effective October 1, 1935, provided in Section 218(a) (49 U.S.C. 318(a)), in part, as follows:

It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules, or in the discretion of the Commission copies of contracts, containing the minimum charges of such carrier of passengers or property in interstate or foreign commerce * * *.

found under the then existing law that contract carriers filed with it minimum rates which they never charged their shippers and never intended to charge and were in fact fictitious or paper rates having no relation to the charges received by the carriers. In the situation then prevailing, and obviously permitted by the law as then written, it was impossible for the Commission—charged with the duty of regulating these contract carriers—even to know the lowest charge the carrier was actually making for performing services for shippers. Thus the Commission was handicapped in carrying out the duty imposed by Section 218(b) of determining and prescribing a "just and reasonable minimum rate or charge"[11] for such carriers. In addition under these circumstances and under this state of the law it was also impossible for other contract carriers as well as for common carriers to know the true character of the competition by which they were confronted.

[11] Section 218(b) (49 U.S.C. Sec. 318(b)) provides:

Whenever, after hearing, upon complaint, or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle * * * for the transportation of passengers or property * * * contravenes the national transportation policy declared in this act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable minimum rate or charge * * * as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge * * * so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle. See *Cast-Iron Pipe Pennsylvania Points to New England*, 27 M.C.C. 737, 739.

The Commission recognized that before it could effectively exercise the right and duties delegated to it in connection with the prescription of just and reasonable minimum rates or charges of contract carriers, before it could protect other carriers from unfair competition in rates, and before competing common or contract carriers could even know the true character of the competition with which they were fa[illegible], it would be necessary to amend Section 218(a) in such a way as to require contract carriers to file schedules containing the minimum rates or charges actually maintained and charged. Accordingly, the Chairman of the Commission's Legislative Committee, the late Commissioner Joseph B. Eastman, on January 29, 1940, addressed a letter to the Chairman of the Senate Committee on Interstate Commerce, and the Chairman of the House Committee on Interstate and Foreign Commerce, recommending among other changes in the Motor Carrier Act that Section 218(a) be amended by inserting, after the clause providing that contract carriers shall file with the Commission their schedules of minimum rates, the words "schedules of minimum rates, fares, or charges actually maintained and charged.[12] "

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[12] The letter was published by the House Committee, 76th Congress, 3d Session, and considered by both the house and Senate in connection with Senate Bill 2009, which was enacted into law as the Transportation Act of 1940. After quoting the proposed amendment which was subsequently adopted

In its consideration of the legislative history of Section 218(a) of the act the District Court stated that: [13]

> "Section 318(a) (49 USC) was deliberately amended to remove what the Commission thought was an evil inherent in the disparity between the posted schedule rate and the unpublished contract rate. The order of the Commission is in obedience to the Congressional mandate.

A search of the decisions of the Commission will reveal a uniform and settled construction of Section 218(a) as amended by the Transportation Act of 1940, to mean that a contract carrier by motor vehicle must file the lowest rates "actually maintained and charged" for transportation services

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verbatim by Congress, the letter contained the following explanation of the reason for the amendment (page 27):

Important.—* * * The words "actually maintained and charged" are not in section 218(a) of Part II, and under that subsection schedules may now be filed containing minimum charges which are fictitious, i.e., which never have been and never will be charged. The words thus inserted will make it necessary to include in the schedules the lowest rates, fares, and charges, which are actually assessed, and hence the schedules will give competing common or contract carriers adequate notice of the true character of the competition by which they are confronted. (House Committee Print, Omnibus Transportation Legislation, Letter from the Chairman of the Legislative Committee Interstate Commerce Commission, 76th Cong., 3d Sess., U.S.G.P.O., Washington; 1940.)

[13] Mimeographed majority opinion, p. 5, attached to appellants' jurisdictional statement herein. See also the Commission's report pp. 602-3, containing reference to the conference report, Transportation Act 1940, Report No. 2832, 76th Cong. p. 79, reflecting views in the letter quoted.

rendered. See *Filing of Contracts by Contract Carriers*, 28 M.C.C. 75, 76; *Shipman Bros. Contract Charges, California and Idaho*, 30 M.C.C. 229, 231; *Contract Minimum Charges from and to Baltimore, Md.*, 32 M.C.C. 273, 287; *Petroleum Products from Wyoming Points to Missoula, Mont.* Ibid. 453; *Filing of Contracts by Contract Carriers*, 41 M.C.C. 527, 528.

The administrative interpretations, decisions, and practices of the Commission with respect to the meaning of the words "actually maintained and charged" are entitled to great weight.[14]

Only one Federal Court decision can be found bearing directly on the interpretation of Section 218(a).[15] The case referred to is Interstate Com-

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[14] See *United States* v. *American Trucking Association*, 310 U.S. 534, 549; *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U.S. 422, 426; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-89; *O. C. Wiley & Sons* v. *United States*, 85 F. Supp. 542, 544, affirmed 338 U.S. 902. While the only question involved in the instant case is one of law, the Supreme Court's decision in the most recent case on the subject of the weight to be given the Commission's interpretation of a statute, *Levinson* v. *Spector Motor Co.*, 330 U.S. 649, 672, is apposite, where the Court stated:

> As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration. * * *

[15] In the Betterman case (80A (2d) 66, 70, Cert. denied 96 L. ED. 32) relied upon by appellants, the rate filing provisions of the Pennsylvania Public Utilities Commission are unlike those of Section 218(a) of the Interstate Commerce Act. In the State act the requirement of Section 809(a) was that "No such contract carrier shall engage in the transportation of passengers or property unless the minimum

merce Commission v. John A. Ralston, doing business as Ralston Transport Co., (decided by the District Court, Southern District of Ohio, Eastern Division on October 25, 1950, not reported. However, a true copy of the Court's Memorandum is attached to this motion as Appendix "A".) The Court's decision in that case clearly supports the decisions of the Commission in its aforesaid interpretation of Section 218(a) of the act.

In respect of appellants' claim that the Commission's interpretation of Section 218(a) would result in the contract rates and charges being made public contrary to the provisions of Section 220(a), (which prohibits the Commission from making public any contract between a contract carrier and a shipper), we submit that such interpretation is not contrary to the Congressional intent. This claim is advanced in appellants' jurisdictional statement (p. 9) in support of their claim that this appeal presents a substantial question.

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charges for such transportation by such carrier have been filed with the Commission, *or copies of all contracts* reduced to writing and filed with the Commission." Pennsylvania Public Utility Code 66 P.S. Sec. 1309(a). It will be seen that this statute is unlike Section 218(a) of the Interstate Commerce Act in two particulars. First, the State act does not require the filing of schedules containing the minimum rates and charges "actually maintained and charged" as required by the Interstate Act, and secondly, the State act requires the filing of either minimum schedules, or copies of written contracts with shippers, while the Interstate Commerce Act requires the filing of both the schedule and contract. The two statutes being dissimilar it is submitted that the interpretation of the state statute by the Supreme Court of Pennsylvania, (certiorari denied by this Court,) cannot be relied upon as a precedent in the instant case.

It will be observed from reading Section 220(a) that the confidential nature of the contracts required to be filed with the Commission is conditional and limited and qualified for the purpose of permitting the Commission to disclose their contents when necessary in the public interest and in the interest of enforcement of Section 218(a)[16]. It is clear that Congress intended by the language used in the proviso of Section 220(a) to indicate that the provisions of Section 218(a) are paramount and must override the qualified and conditional privilege of secrecy contained in Section 220(a). It is difficult to understand how this latter section operates to relieve a carrier from filing schedules of minimum rates. The schedule is not the contract and the requirement that minimum rates be filed and published is clear and definite.

Indeed the proviso in Section 220(a), that "if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 218(a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof" would seem plainly to indicate that the Commission is empowered to, not foreclosed from, making public rates shown in a contract which do not conform, as

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[16] The proviso of Section 220(a), here pertinent, is quoted at footnote 3.

here, to the published schedule. For here it is conceded that the schedules do not reveal the minimum rates "actually maintained and charged" as required by Section 218(a) while the contracts do. In other words, nothing in Section 220(a) requires that actual minimum rates be kept confidential; on the contrary, the Congressional purpose to have such rates available to the public, either by schedule or publication of the contract rate, is clear.

In any event the only confidential information that would be disclosed as far as appellant carrier is concerned is the rate itself. But the rate is only one term of the contract. No disclosure is made of other provisions of the contract, such as volume of traffic offered, duration of the agreement, provisions for accessorial service, etc. Although the rate or charge is perhaps the most vital single term of the contract, it alone is hardly more important than the body of the remaining provisions. Under the Commission's decision in this case all these remaining provisions continue to be secret.

The disclosure complained of results from operation of the law and the Commission is powerless to change the law. If appellants desire to escape the effect of the statute they must apply to Congress for relief instead of the Commission or the Courts.

In respect of appellants' contention that the Commission's interpretation of Section 218(a) destroys the distinction between common and contract

carriers in regard to the flexibility and freedom of contract and particularly the distinction pertaining to the different standards of rate regulation applicable to such classes of carriers, appellees submit that the order has no such effect.

What appellants wish to accomplish is to obtain a ruling by this Court that would permit them, after *pro forma* compliance by the initial filing of a contract and schedule of rates and charges, immediately to enter into a new contract, refuse to file an appropriate schedule, and thereafter to be free to fix minimum rates, to prefer and discriminate in secrecy completely outside the knowledge of its competitors. It was to prevent such practices that the amendment of 1940 was passed.

The pertinent provisions of the statute, applicable to common and contract carriers[17] reveal numerous and significant differences wholly unaffected by the interpretation here in issue. For example appellant carrier may continue to "pick and choose" its customers; it may discriminate if it so desired in its services to its customers and its charges may be called in question only if they fall below a reasonable minimum level; it can contract freely with its customers; charge whatever rate it is able to negotiate with them, subject only to the requirement that the transportation performed pursuant to such contracts is authorized by its per-

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[17] Sections 207, 208, 216, 217, applicable to common carriers, and 209, 218 applicable to contract carriers.

mit and that it keep on file with the Commission schedules containing reasonable minimum rates or charges which must be the rate "actually maintained and charged." Appellant carrier does not have to hold itself out to the public to carry for all who seek its services and it does not have to adhere to published rates as is required of common carriers. Neither do the provisions against discrimination, preference, or prejudice apply against contract carriers. Neither would it have to prove convenience and necessity in qualifying for operating rights, as is required of common carriers, but may secure a permit by a showing that its service will be consistent with the public interest and the national transportation policy. In fact the report and order of the Commission in no wise changes or alters the distinction between the rules, regulations, or requirements made applicable to common and contract carriers as separate and distinct types of transportation agencies.

Furthermore appellants urge (p. 9 of the jurisdictional statement) that the question presented on this appeal is substantial for the additional reason that the operations, contracts, schedules and permits of all contract carriers are involved; that the Commission's interpretation destroys the flexibility and freedom of contract inherent in contract carriage in that regulations of the Commission provide that no change may be made in published schedules of minimum rates and charges of con-

tract carriers except on 30 days' notice; and that the regulations require that in the filing of such schedules copies of the contracts involved must be filed at the same time, although subsequent contracts or amendments of prior contracts may be filed within 20 days.

There is no foundation whatsoever for the contention that operations, contracts, schedules, and permits of all contract carriers are involved in, or affected by the Commission's order herein. It is submitted that the carrier with only a single shipper is the only one affected. Illustrations of the operation of the statute and the applicable rules and regulations of the Commission with respect to the requirement for filing schedules of minimum rates and contracts are contained in Appendix "B" hereto. By reading these illustrations a clearer understanding will be gained of how the Commission's interpretation, with respect to the filing requirements of Sections 218(a) and 220(a), as well as with the Commission's own rules and regulations, apply to contract carriers having a single shipper as distinguished from such carriers having contracts with more than one shipper.

There is no substance to the claim that the Commission's interpretation of Section 218(a) destroys the flexibility and freedom of contract inherent in contract carriage in that the regulations prescribed in Rule 8(b) of the Commission's Tariff Circular

MF-No. 2[18] require that no change may be made in published schedules of minimum rates and charges except on 30 days' notice before they could become effective, with the possibility of further delay in the event the schedules are suspended under Section 218(c).

In respect of the alleged hardship which the appellants contend would result from the requirement of 30 days' notice, particularly when circumstances might warrant immediate increase or decrease of rates and charges in order to meet fluctuating costs, it is submitted that a complete answer to this allegation is found in the provisions of Section 218(a)[19] which provides that "the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules." In view of the Commission's reputation for reasonableness and fairness in matters of this sort and especially where, as here, there is statutory authority for the exercise of discretion, it is submitted

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[18] Rule 8(b), Tariff Circular MF-No. 2, 49 C.F.R. 187.7(b) provides: *Required notice.*—Unless otherwise authorized by the Commission, all schedules of minimum rates or charges and supplements thereto shall be filed and posted at least 30 days prior to the effective date thereof.

[19] Section 218(a) provides with respect to the requirement of 30 days' notice: * * * but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules.

that there is no basis for any alleged destruction of flexibility.

As regards appellants apprehension that still further delay might result in the suspension of the schedules and the rates and charges being deferred pending notice and hearing under Section 218(c) [20] the Court's attention is directed to the provisions of this section which show clearly that this type of procedure obtains only when "any schedule stating a charge for a new service or a reduced charge" is sought to be filed. It does not apply to appellant carrier's situation at all.

There is also no substance to appellants' remaining allegations contained in their jurisdictional statement (pages 10-12) that the question presented in their appeal is substantial for the further reason that (1) the effect of the Commission's order destroys the distinctly different standards

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[20] Section 218(c) provides that: Whenever there shall be filed with the Commission by any such contract carrier *any schedule stating a charge for a new service or a reduced charge* directly, or by means of any rule, regulation, or practice, for the transportation of passengers or property in interstate or foreign commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, * * *. (Emphasis added.)

of rate regulations applicable to contract and common carriers by motor vehicle contrary to and in derogation of the established transportation policy, and (2) that it results in discriminatory subclassifications of contract carriers.

Respecting (1) above, Congress, in its examination of the statute obtaining prior to the 1940 amendment, and the operations of contract carriers thereunder, changed the law deliberately to confer upon the Commission the power here exercised and complained of. Treating the question raised in (1), the District Court gave an entirely adequate and satisfactory answer to the point in its opinion (page 5) wherein it stated:

> "It is true that the Commission's order has the effect of construing Section 318(a) to require a contract carrier to file and publish a schedule of rates and charges which it actually maintains and charges any one shipper, and since Auto has a contract under its permit with only one shipper," the order has the rather anomalous effect of requiring it to actually charge that shipper the rates filed and published in its schedule." In other words, the contract rate must be the reasonable minimum scheduled rate, or vice versa." But, this does not prohibit Auto and intervenor from contracting for any rate they choose, so long as they file the schedule showing such rate to be the posted minimum reasonable rate."

Section 318(a) was deliberately amended to remove what the Commission thought was an

evil inherent in the disparity between the posted schedule rate and the unpublished contract rate. "The order of the Commission is in obedience to the Congressional mandate." If the requirement for posting the schedule of minimum rates at least thirty days prior to the effective date works a hardship, the Commission is authorized to ameliorate it. In any event, the requirement does not destroy the validity of the Commission's order.

Appellants contend that the Commission's interpretation of the law identifies the "minimum rate actually maintained and charged" as being also the maximum rate. But Congress, by amending Section 218(a) in 1940 so as to require the filing of the "minimum rate actually maintained and charged," gave recognition to practical conditions in contract carriage and undoubtedly intended the consequences of which appellants complain.

In regard to appellants' contention that the Commission's interpretation of Section 218(a) results in discriminatory subclassification of contract carriers it is insisted that there is no basis for such a contention. Such status as appellant carrier may occupy results from its chosen type of operation and from the contract it voluntarily entered into, and not from any action required of it by this Commission.

The same contentions, expressed in appellants jurisdictional statement and relied upon in support of their claim that the appeal presents a sub-

stantial question, were made before the Commission and the District Court and decisively rejected by both tribunals.

For the foregoing reasons it is clear that the appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
Washington, D. C.

JANUARY 1952.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 2780

INTERSTATE COMMERCE COMMISSION, PLAINTIFF

v.

JOHN A. RALSTON, doing business as
RALSTON TRANSPORT COMPANY, DEFENDANT

MEMORANDUM

This is a suit wherein the Interstate Commerce Commission seeks to enjoin the defendant from transporting property by motor vehicle in interstate commerce over and on the public highways under individual contracts or agreements for compensation, whether over regular or irregular routes, unless and until such time as the said John A. Ralston actually maintains and charges the rates set forth in the schedule of minimum rates and charges filed with the Commission and published and kept open to public inspection showing minimum rates and charges for transportation and all service in connection therewith of property in interstate or foreign commerce.

The complaint alleges that defendant has been charging more than the minimum rates which defendant had filed with the Interstate Commerce Commission. The answer of defendant admits the factual allegations of the complaint but denies that there has been any violation of law. This case was

submitted to the Court on a Stipulation of Facts and the Court having carefully considered the same, together with the pleadings and briefs, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That said defendant transported the shipments of property by motor vehicle in interstate commerce over the public highways under an individual contract and agreement with Quaker State Oil Refining Corporation, which contract is duly filed with and accepted by the Interstate Commerce Commission, from St. Marys, West Virginia to points of destination shown in Exhibit A, attached to said Complaint, on the dates shown in said Exhibit A, and received as compensation therefor, the sums of money set forth in said Exhibit A, which sums of money are greater than the rates set forth in the schedule shown in Exhibit B, attached to the said Complaint.

2. That in no instance set forth in said Exhibit A did defendant, John A. Ralston, charge or receive as compensation an amount which is less than the amount required under the schedule of minimum rates and charges duly filed and published with the Interstate Commerce Commission, which schedule of minimum rates and charges is shown on Exhibit B, attached to plaintiff's Complaint.

3. That in bringing this civil action the Interstate Commerce Commission is relying on Sections 218 and 222 of the Interstate Commerce Act in their entirety, which are otherwise known as Title 49, U.S.C., Sections 318 and 322, respectively, and

also upon Section 220(a) of said Act, also known as Title 49, U.S.C. Section 320(a).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this suit.

2. Title 49, Section 318(a) requires that defendant actually maintain and charge rates set forth in a schedule of minimum rates and charges filed with the Interstate Commerce Commission.

3. Since defendant has been following a course of conduct which indicates a continuing failure to comply with Section 318(a) of Title 49, it is probable that such lack of compliance will continue unless an injunction is issued against defendant.

4. A permanent injunction should issue enjoining defendant from in any manner directly or indirectly transporting property by motor vehicle in interstate commerce over and on the public highways under individual contracts or agreements for compensation, whether over regular or irregular routes, unless and until such time as the said John A. Ralston actually maintains and charges the rates set forth in a schedule of minimum rates and charges filed with the Commission and published and kept open to public inspection showing the minimum rates and charges for the transportation, and all services in connection therewith, of property in interstate or foreign commerce.

Entry accordingly.

(S) MELL G. UNDERWOOD,
Judge, U. S. District Court.

APPENDIX B

Illustrations of the Operation of the Commission's Rule Relative to the Filing of Schedules of Minimum Rates and Charges and Copies of Contracts

The Commission's tariff regulation pertinent here (49 C.F.R. 187.8), states that "The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged.[21]" It will immediately be observed that the last four words are taken bodily from Section 218(a) as amended by the Act of 1940. In actual practice, as well as in the rule, there is no discrimination against a carrier because of size or number of contracts. Contrary to plaintiff's contention, the Commission requires a schedule change only when a change occurs in the minimum rate or charge.

All contract carriers must file copies of all subject contracts held and, in addition, schedules reflecting the minimum rates therein. While the contracts remain secret, the schedules are open to public examination, including examination by competitors. Illustrations of the operation of the rule follow:

Carrier A, holding a single contract for the transportation of a single commodity must file with the Commission (1) a copy of the contract and (2) a schedule showing the minimum rate actually

[21] Tables of minimum rates or charges. (1) The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged. (Emphasis added.) (49 C.F.R. 187.8.)

maintained and charged for transporting that commodity under the contract. Carrier B holding a single contract for the transportation of three commodities must file with the Commission (1) a copy of the contract and (2) a schedule showing the minimum rate actually maintained and charged for transporting each of the three commodities under the contract. Carrier C holding three contracts, one with each of three shippers, for three different commodities, must file with the Commission (1) a copy of each of the three contracts and (2) a schedule showing the minimum rate actually maintained and charged for transporting each of the three commodities under the three separate contracts. He might, if he chose, file three schedules, one for each contract.

If carrier A, by contract amendment, decreases the minimum rate on the single commodity embraced in its contract the schedule must be correspondingly amended. If by like method it increases the minimum rate, the schedule must be correspondingly amended. This is necessary to observe the injunction that a schedule of rates "actually maintained and charged" must be filed.

If carrier B, by contract amendment, decreases the minimum rate on one or more of the three commodities embraced within the terms of its contract, the schedule must be correspondingly amended. If by like method it increases the minimum rate on one or more of the three commodities embraced within the terms of its contract, the schedule must be correspondingly amended. As in the case above, this is necessary to observe the injunction that a schedule of rates "actually maintained and charged" must be filed.

If carrier C, by contract amendment, decreases the minimum rate on one or more of the three different commodities embraced within the terms of its three separate contracts, the schedule must be correspondingly amended. If by like method it increases the minimum rate on one or more of the three commodities embraced within the terms of its contracts the schedule must be correspondingly amended. As with carriers A and B, this is necessary to observe the requirement that a schedule of rates "actually maintained and charged" must be filed.

No discrimination is worked as between carriers holding one contract and those holding more than one. Any seeming generality of tariff rule apparent in the illustrations given arises from the statutory treatment of contract carriers, but it cannot be said that either the statutory language or the pertinent regulations of the Commission imposes upon a carrier with a single contract any discrimination, nor does either require the filing of schedule changes where the minimum charge remains fixed.

Endorsed: Filed in District Court January 22, 1952.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. .....

AUTO TRANSPORTS, INC., and GENERAL MOTORS CORPORATION,
Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM.

OPINION BELOW.

The opinions of the specially constituted United States District Court for the Western District of Oklahoma in Civil Action No. 5009, both majority and minority, are reported in **Auto Transports v. United States**, 101 F. Supp. 132. The majority opinion sustains an order of the Interstate Commerce Commission designed to require appellant, Auto Transports, Inc., to suspend operations as a contract

carrier by motor vehicle for failure to comply with the Commission's interpretation of the rate provisions, Part II of the Interstate Commerce Act (Title 49, U. S. C. 301, et seq.).

JURISDICTION.

Statutes believed to sustain the appellate jurisdiction are as follows: U. S. Code, Title 28, Sections 1253, 1336, 2321 and 2325. These sections are set forth in full in the jurisdictional statement.

QUESTION PRESENTED.

Whether Title 49, U. S. C., Section 318 (a),[1] requires appellant, Auto Transports, Inc., to file with the Interstate Commerce Commission as a schedule of minimum rates or charges the actual contract charges contained in its current contract with appellant, General Motors Corporation, which contract is required to be filed with the Interstate Commerce Commission under the provisions of Title 49, U. S. C., Section 320 (a).

STATUTES AND REGULATIONS INVOLVED.

Among other things, the Interstate Commerce Act (Title 49, U. S. C.) regulates the operations in interstate or foreign commerce of motor carriers engaged in the transportation of property for compensation. This statute separately defines common carriers by motor vehicle and contract carriers by motor vehicle. Section 303 (14) defined the term "common carrier by motor vehicle" in this act to mean "any person who holds itself out to the gen-

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1 Title 49 is the Interstate Commerce Act, as amended. Part II of the Interstate Commerce Act governs the operation of motor carriers and the sections therein are numbered in the 200 series. In this brief, however, appellants will use the 300 series which is in accordance with the United States Code numbering system.

eral public to engage in the transportation by motor vehicle . . . of property . . . for compensation" (Title 49, U. S. C.).

Section 303 (15) defines a contract carrier in the following language:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation [other than transportation referred to in paragraph (14) and the exception therein] by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Appellant, Auto Transports, Inc., is a contract motor carrier and is authorized to do business under a permit issued by the Commission pursuant to the provisions of Section 309 of the Act.[2]

Among the necessary requirements in the case of a contract motor carrier is that it file with the Commission, publish and keep open for inspection, a "schedule of minimum rates and charges actually maintained and charged" [Sec. 318 (a)]. This section further provides that no reduction may be made by the contract carrier in its schedule of minimum rates and charges except in accordance with the procedure specifically described in the section. This procedure requires a delay of thirty days before a new schedule may become effective, subject, however, to the right of the Commission to suspend the schedule for a period not to exceed seven months. The section further provides that a contract carrier shall not charge a shipper under its contract less compensation for transportation service than would be provided for in the schedule of mini-

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2 Section 309 authorizes the Commission to issue permits to contract carriers if the operation proposed is consistent with the public interest and the National Transportation Policy, and appellant, therefore, is qualified; this section is not involved.

mum rates and charges. Section 318 (a) is set forth in full in Appendix A.

Section 320 (a) of the Act authorizes the Commission to require contract motor carriers to file with it copies of contracts. This section requires that such contracts must conform to the requirements of Section 318 (a). The provisions of Section 320 (a) are set forth in Appendix B.

The Commission has promulgated certain regulations relative to the filing of schedules of minimum rates and charges and the filing of the contracts. The regulation on the filing of schedules is practically a restatement of the statutory requirements except that in the case of the regulation the Commission requires "all" changes in schedules to be filed on statutory notice. These particular regulations are contained in the Code of Federal Regulations, Title 49, Section 187.0-187.10, and shown in part in Appendix C.

The Commission's regulations relative to the filing of contracts is found in the Code of Federal Regulations, Title 49, Section 173.1 through 173.6. This regulation requires that a contract between a shipper and a carrier must be bilateral and impose specific obligations upon both shipper and carrier and that it shall cover a series of shipments during a stated period of time in contrast to contracts of carriage covering individual shipments which is the case when a shipper utilizes the services of a common carrier. These regulatory provisions, to the extent here important, are set forth in Appendix D.

Section 318 (b) of the Act empowers the Commission to prescribe minimum rates and charges of contract carriers after proper investigation. The provisions of this section of the statute are set forth in Appendix E.

STATEMENT.

Appellant Auto Transports, Inc., of Oklahoma City, Oklahoma, is a contract carrier by motor vehicle authorized to perform a transportation service in the delivery of new automobiles from Wyandotte County, Kansas, to points in 15 states.[3] Appellant General Motors Corporation produces new automobiles at a point in Kansas City, Wyandotte County, Kansas, and engages the service of appellant Auto Transports, Inc., to deliver the new automobiles in the authorized territory. The production activities of this plant commenced during the summer of 1946 and, concurrently therewith, appellants entered into a contract for the transportation service required for the delivery of the new automobiles. The contract between appellants was filed with the Commission as required by its rules.[4] Before the commencement of the motor carrier operation in 1946 Auto Transports, Inc., filed with the Commission and published as required by the Act a schedule of minimum rates and charges actually maintained and charged.[5] At that time the aforesaid contract contained rates and charges which were the same as the rates and charges contained in the schedule of minimum rates and charges. The minimum rate schedule has been neither modified nor revised. The contract, on the other hand, has been amended from time to time to provide for necessary increases in the rates and charges of appellant Auto Transports, Inc. These contract amendments were filed by said appellant with the Commission in accordance with its regulations in connection therewith, that is,

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3 A permit was duly issued by the Interstate Commerce Commission on August 27, 1947, following temporary authority granted July 12, 1946. Title 49, U. S. C., Secs. 309 and 310.

4 This rule is contained in Appendix D hereto.

5 This requirement is contained in Section 318 (a) of the act, the text of which is set forth in Appendix B hereto.

within 20 days after the effective date of each such contract amendment (Appendix D).

Amendments to appellants' contract were not questioned by the Commission until November 1, 1948. An amendment filed then was questioned by the Director of the Bureau of Motor Carriers of the Commission because it reflected rates higher than the rates contained in the published schedule of minimum rates. The Director informed appellants by letter that in situations where only one shipper is served by a contract carrier, the rates and charges should be the same in both the contract and the published minimum rate schedule. Thereafter, on November 1, 1949, the Commission issued against Auto Transports, Inc., an order to show cause, within 30 days, why its permit should not be suspended because of violation of the contract carrier minimum rate section of the Act [Section 318 (a)]. Appellant Auto Transports, Inc., timely answered the show cause order, and the report and order of Division 5 of the Commission dated May 17, 1950, suspending complainant's "right to engage in transportation" was entered. This is the order which was sustained by the majority in the district court and which is here under attack. Petitions filed with the Commission by appellants, seeking reconsideration of the order, were denied.

The procedure, under which the Commission's order issued, is allowed by the second proviso of Section 312 (a) of the Act. While there is no procedural question here in issue under Section 312 (a), the authority of the Commission to issue the order is challenged.

ARGUMENT.

In their motion to affirm, appellees simply conclude that the appeal presents no substantial question and, in the circumstances, the judgment of the district court should be affirmed. This, indeed, is oversimplification, particularly so since the motion seeks to affirm an order of the district court bred out of a basic error of law.

Efforts to explain away the all important separate standards of regulation of contract carriers on the one hand and common carriers on the other, and the private nature of the former, are wholly unsatisfactory in the motion. Moreover, the motion utterly fails, as did the majority in the district court below, to consider the constitutional aspects of the construction placed on section 318 (a) by the Commission.

Appellees also claim that this controversy involves only contract carriers serving a single shipper, which is the situation with appellants. This is an admission by appellees that the order does create a subclassification of contract motor carrier, as urged by appellants.

It is the position of appellants that a very substantial question is presented in this matter. There is a fundamental question of statutory construction not heretofore considered by this court. Next, a question is presented as to the power and authority of the Interstate Commerce Commission to issue the order in question. Finally, there is presented the very substantial effect upon the entire contract carrier industry, and shippers using such carriers, which would result from the interpretation placed on the Act by the Commission and the court below.

It is readily apparent that the Commission's construction of the Act, in effect, creates a subclassification of

contract carriers by motor vehicle, i. e., carriers having a contract with only one shipper, and that there is no authority in the statute under which the Commission could create such a subclassification. Furthermore, the interpretation placed on the Interstate Commerce Act by the Commission in this matter completely destroys the distinction between common carriers and contract carriers which has been so carefully preserved by the Congress in its scheme of regulation of motor carriers, as reflected by Part II of the Interstate Commerce Act (49 U. S. C., Section 301, et seq.).

The only authority possessed by the Commission to establish classifications of carriers is contaned in Sec. 304 (b) of the Act, and such authority has heretofore been exercised. **Classification of Motor Carriers**, 2 M. C. C. 703.

The essence of the litigation is whether or not the Commission and the district court erroneously construed the requirements of Section 318 (a) of the Act in holding that the contract rates and the minimum rates must be exactly the same at all times. Appellants contend that the district court and the Commission so erred. If there was no error, then, plainly, the statute, as construed, is unconstitutional in that it violates the due process of law clause of the Fifth Amendment to the Constitution of the United States.

(a) **The Authority of the Interstate Commerce Commission.**

The authority of the Commission, of course, is circumscribed by the bounds of the Interstate Commerce Act. One question here is whether, in 1940[6], the Congress enlarged that authority by empowering the Commission to require minimum rates and contract rates to be the same.

6 Sections 318 and 320 were amended September 18, 1940.

After a discussion of the Commission's problem in policing rates of contract carriers prior to the 1940 amendment the motion states that it was "impossible" for the Commission to know the lowest charge made by a contract carrier, and that "the Commission was handicapped in carrying out the duty, imposed by Section 318 (a), of determining and prescribing a 'just and reasonable minimum rate or charge' for such carriers."

There is no foundation for these statements by appellees. Section 318 (b) prior to the 1940 amendment, and to the extent here important, reads as follows:

> "Whenever, after hearing upon complaint or its own initiative, the commission finds that any charge of any contract carrier or carriers by motor vehicle, or any rule, regulation, or practice of any such carrier or carriers affecting such charge, or the value of the service thereunder, for the transportation of passengers or property in interstate or foreign commerce, contravenes the policy declared in section 202 (a) of this chapter, **the commission may prescribe such minimum charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote the policy declared in said section.**"[7] (Emphasis added.)

The section was amended in 1940 to read as follows:

> "Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national trans-

7 49 Stat. L. 561.

> portation policy declared in this Act, or is in contravention of any provision of this part, **the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part.**"[8] (Emphasis added.)

Section 318 (b) as amended in 1940 did not enlarge the power of the Commission to investigate and prescribe reasonable minimum rates or charges for contract carriers. The Commission already had that power. It follows then that contrary to the statement in the motion, the Commission was not handicapped in its power to police or prescribe rates and charges of contract carriers. What, then, did the 1940 amendment do? Essentially, the 1940 amendment specifically, in Section 318 (a), requires contract carriers to maintain "reasonable minimum rates"; the Commission always had authority to require the contract motor carriers to do just that.

Significantly, the Commission, in its 63rd Annual Report to the Congress, dated November 1, 1949, recited its authority in this manner:

> "As to contract carriers, our power is limited to the prescription of reasonable minimum rates" (p. 61).

In support of the position that the Commission was handicapped prior to the 1940 amendment and that its authority was enlarged thereby, the motion cites **Cast Iron Pipe, Pennsylvania Points to New England,** 27 M. C. C. 737 (1941). The cited case certainly lends no support for the statement that the Commission was handicapped in regulating the rates and charges of contract carriers prior to

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[8] 54 Stat. L. 925.

the 1940 amendment. In the cited case the Commission approved certain new minimum rates proposed by a contract carrier and in doing so made the following significant statement:

> "Under Section 318 (a) of the Interstate Commerce Act, it is the duty of the contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges" (p. 739).

Indeed, that case supports appellants' contention as the language used by the Commission above indicates.

The motion takes the further position that an alleged additional infirmity existed in the Act prior to the 1940 amendment in that common carriers were unable to determine the true character of competition by contract carriers. This allegation, of course, is gratuitous speculation, but even if true the Commission under its powers prior to the 1940 amendment, and particularly under Section 318 (b), could have remedied such a situation. Instead of meeting any such situation under its then existing powers, the Commission elected to sponsor legislation to correct this alleged but non-existing infirmity. In doing so, it is important to note that the Commission supplied the phrase "actually maintained and charged," which was inserted in Section 318 (a) by the Congress. However, the Congress apparently recognizing the significance of its action so amended Section 318 (a) by requiring that the minimum rates or charges contained in the schedule to be published must henceforth be "reasonable" minimum rates in contradistinction to rates the Commission had previously permitted contract carriers to publish, which rates had "never been and never will be charged." The important change in the 1940 amendment, and it is overlooked by appellees and the majority opinion in the court below, is the change in Section 318 (a) which simply required minimum rates and charges to be **reasonable.**

The Congress did not change the prohibitory parts of Section 318 (a), namely, those parts which preclude any reductions in the schedule of minimum rates except in compliance with the terms of the section, and the language which bars a contract carrier from demanding, charging or collecting "a less compensation for such transportation than the charges filed in accordance with" Section 318 (a).

The authority of the Commission was not enlarged by the 1940 amendment; the amendment did require the contract carrier to maintain "reasonable" rates.

Appellees' principal basis for its interpretation of Section 318 (a), as amended, as appears at pages five, et seq. of the motion to affirm, is what the motion sees fit to term the "legislative history" of the amendment, as reflected by a letter addressed by the Chairman of the Commission to the Chairman of the Senate Committee on Interstate Commerce and the Chairman of the House Committee on Interstate and Foreign Commerce, quoted in part as a footnote at page eight of the motion. We respectfully present that such letter, given all the weight to which it is entitled, does not support appellees' position and that the conclusion cannot be drawn that Congress, by the amendment requiring publication, in the future, of a schedule containing "reasonable" rates intended that the published rates and rates contained in subsequent amendments to contracts must be identical. As is to be seen from said leter, it is based upon the fact that prior to the 1940 amendment contract carriers could file schedules containing "fictitious" charges "which never have been and never will be charged." Such is not the situation in the case at bar; the published minimum rates are admittedly reasonable, have been charged, and at no time have rates less than the published rates been charged.

On the question of legislative history it is respectfully presented that the views of Congress itself with respect

to legislation enacted by it are entitled to more weight than a communication from an administrative agency while proposed legislation was in formative stages. Thus, if Congressional interpretation of the 1940 amendment was such that, at all times, published minimum rates of contract carriers should be actual rates charged, and if such had been the intent of Congress in enacting the amendment to Section 318 (a), no further legislation would be indicated. It is extremely significant, however, that a bill has recently been introduced in the Senate of the United States, jointly sponsored by three distinguished members of the Senate Committee on Interstate and Foreign Commerce, to further amend Section 318 (a) by, among other things, elision therefrom of the word "minimum". The bill, being Senate Bill S.2752,[9] is captioned "A Bill to Require the Establishment of Actual Rates by Contract Carriers." Thus, obviously, the Congress construes its own legislation as it now stands as being subject to the interpretation placed thereon by appellants and that the interpretation thereof by appellees, as reflected by the motion to affirm, is untenable. It is believed, at least in some quarters, that Senate Bill 2752 was introduced in anticipation of the ultimate outcome of this litigation.

(b) **Appellee's Interpretation of the Act Erroneous.**

The Commission's decision, and that of the majority in the court below, is based solely on the language of the second sentence of Section 318 (a) of the Act. That sentence reads as follows:

> "It shall be the duty of every contract carrier by motor vehicle to file with the Commission schedules containing **the minimum rates or charges of such carrier actually maintained and charged** for the trans-

[9] That portion of Senate Bill 2752 referring to Section 218 (a) of the Interstate Commerce Act, as amended [Title 49, U. S. Code, Section 318 (a)], is attached hereto as Appendix F.

portation of passengers or property in interstate or foreign commerce, and any rule, regulation or practice affecting such rates or charges and the value of the services thereunder." (Emphasis added.)

To remove this sentence from context and to undertake to justify it as the keystone of the regulation, as does the motion to affirm, completely ignores other very significant and equally applicable provisions of the Act and of the same section thereof. Indeed, the interpretation placed on this very sentence by the Commisison and the majority in the court below is not in accord with the manifest intent of the sentence. For example, the sentence merely requires that the carrier file and publish a schedule of **minimum** rates or charges.[10] Other important requirements in the section are: (1) no reduction shall be made in the minimum rates except on 30 days' notice (subject to a suspension procedure which could delay the effective date even longer), and (2) the prohibition against charging less compensation than provided for by the minimum. The sentence cannot be construed to require the publication of a schedule of minimum rates or charges which is identical with contract rates or charges, which may be in excess of such minima, but such construction constitutes the sole predicate for the order of the Commission and the opinion of the majority of the court below, here attacked.

Such construction is directly opposite to the Commission's own expressed understanding as to its power with respect to contract carriers. In 1942, two years after the effective date of the amended Section 318 (a) here in issue, the Commission in **Wyoming Points to Missoula, Montana,** 32 M. C. C. 453, made this significant statement:

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10 The phrase "actually maintained and charged" in Section 318 (a), on which appellees bottom their case, is at best of nebulous meaning as here used. Appellant, Auto Transports, Inc., nevertheless, and there is no dispute on the fact, has actually charged its minimum rates and has always maintained them.

"The minimum rates of contract carriers are, in fact, not rates at all in the common carrier sense of the word. They are, simply, a floor for the charges actually to be made" (p. 455).

Such statements by the Commission as to its understanding of its authority under Section 318 (a) and the requirements of the Section as applied to minimum rates of contract carriers, when compared to the position assumed in this case discloses a glaring inconsistency. But this inconsistency, it must be urged, is not confined to the Commission's administrative decisions. There is now extant the decision of the majority in the court below upholding the Commission on this point, and a decision by the Supreme Court of Pennsylvania upholding appellants' position. **Betterman v. American Stores**, 80 A (2) 66, certiorari denied by this court October 8, 1951, Case No. 190, 96 L. Ed. 32.

The reference to the **Betterman** case in the Motion to Affirm (page 9, footnote 15), while purporting to describe the issues in that case, leaves a limited impression as to the issues before the Pennsylvania Supreme Court in that case. The **Betterman** case involved not only a question under the Pennsylvania statute as to the right of a contract carrier to collect charges in excess of charges contained in its minimum rate schedule filed with the Pennsylvania regulatory body, but that case also contained the same question as to interstate shipments. The Supreme Court of Pennsylvania held that the contract carrier legally could charge a shipper rates higher than the rates contained in the schedule of minimum rates and charges on file with both the State and Federal Commissions. In that case the Supreme Court of Pennsylvania said (at page 72):

"Defendant makes the same legal contention with respect to the rates filed with the Interstate Commerce

> Commission that it made with respect to those filed with the Public Utility Commission of Pennsylvania, namely, that they were the only charges or rates which could legally be collected. Regardless of any technical violation by plaintiff of the Interstate Commerce Act, the present suit of the **plaintiff does not violate the public policy expressed by said act since plaintiff is making no attempt to collect less than the minimum rates on file with the Commission,** but rather to collect the additional compensation guaranteed by his 1937 contract with this defendant and impliedly referred to in their 1939 contract." (Emphasis added.)

It is a fundamental rule of statutory construction that a sentence cannot be lifted from its context in a statute and be given an interpretation not in harmony with the plain intent of the statute of which it is a part. **U. S. v. Amer. Trucking Assn.**, 310 U. S. 534, 544. Stated otherwise, a statute must be viewed in its entirety to determine what the legislature intended to do. We have already referred to the fact that Section 318 (a), in addition to the requirements as to the filing with the Commission of a schedule of minimum rates and charges, has two other very significant provisions. One provides that the contract carrier shall make no reductions in its schedule of minimum rates or charges, except after 30 days' notice subject to certain suspension procedure provided for in Section 318 (c);[11] the other important provision of the section reads as follows:

> "No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph."

Actually, the interpretation of this section by the Commission and as sustained by the majority in the court

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11 Section 318 (c) of the Act empowers the Commission, upon complaint or on its own initiative, to suspend, for a period not to exceed seven months, schedules of minimum rates stating a charge for a new service or a reduced charge in an existing schedule, for the purpose of investigation.

below has the effect of reading out of the section the word "minimum." It requires no argument that an administrative body has no power to change the application of a statute by an administrative determination. **Miller v. United States**, 294 U. S. 435, 441; **Arizona Grocery v. Atchison Ry.**, 284 U. S. 370. The term "minimum" certainly has some significance as used in this section. In his learned and well-reasoned minority opinion in the court below, Judge Vaught summarized this point in the following language:

> "Nowhere in the statute is there any provision that the minimum rate shall be the same as the rate actually charged. If that were the case, why use the word minimum at all? Minimum has a significant meaning, and in this Act the only reasonable construction that can be placed on the word is that it represents the lowest rate which can be charged by the contract carrier, and since the Act provides that no reduction below the minimum rate shall be charged, except under certain conditions, and makes no reference whatever to an increased rate by contract, it is not clear upon what basis or theory the Government contends that the minimum rate and the rate charged by the contract must be the same and in the event a higher rate than the rate by the contract is charged, an additional schedule must be filed setting forth the minimum rate as the rate actually charged by contract.
>
> "The contentions are inconsistent. Why provide for a schedule of minimum rates if the only rate to be considered by the Commission is the rate shown in the contract? And, why are contract carrier and shipper protected from the publicity of their actual contract rate if that rate must be the same as the minimum rate which is published and kept open to the public for inspection?"

(c) Statutory Classification of Carriers Ignored By Appellees.

When Congress undertook the regulation of for-hire motor carriers, it recognized two general classes, namely, common carriers and contract carriers, and set up different standards as to the respective classes. For example, in testing the right of a common carrier to operate, proof of "public convenience and necessity" must be available;[12] the contract carrier operation must be "consistent with the public interest and the national transportation policy."[13] Again, different standards govern the respective classes in the publication and application of rates and charges. In the latter respect the common carrier must publish the exact rates for the service it renders and it cannot depart from those rates, nor change them, except upon thirty days' notice subject to suspension procedure.[14] On the other hand, the contract carrier must publish its "reasonable minimum rates" but it is only prohibited from charging **less** compensation than is provided for in such published minimum schedule and must not reduce the rates and charges contained in the schedule except upon thirty days' notice subject to suspension procedure.[15] To bring into clearer focus the divergent statutory requirements on this point, it is important to lay down for comparison the language employed by the Congress to govern the published rates of these respective classes of motor carriers. As to common carriers, Section 317 (b) contains the following language:

> "No common carrier by motor vehicle shall charge or demand or collect or receive a **greater or less or different** compensation for transportation . . . than

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12 Section 307.

13 Section 309.

14 Section 317.

15 Section 318.

> the rates . . . specified in the tariffs in effect at the time." (Emphasis added.)

The comparable portion of Section 318 (a) pertaining to the rate requirements of contract carriers is couched in the following language:

> "No such carrier shall demand, charge, or collect a **less compensation** for such transportation than the charges filed in accordance with this paragraph . . . and it shall be unlawful . . . for any such carrier . . . to charge, accept or receive **less than the minimum charges so filed** . . ." (Emphasis added.)

Thus, the fixed price required for common carrier service is materially different from "reasonable" minimums as to contract carrier service. Under the fixed price interpretation of the Commission, or as may be stated otherwise, the maximum and minimum single rate, appellant, Auto Transports, Inc., would, in effect, be required to follow, in the matter of rates and charges, the same practices required by law of common carriers, to-wit: the publication of **exact** rates rather than **minimum** rates. Such an interpretation completely disregards the different standards which Congress has established for the regulation of the two classes of carriers and fails to recognize the inherent advantages of the contract carrier. That the Commission does not always ignore the different standards is apparent from its opinion in **Petroleum Products, Wyoming Points to Missoula, Mont.**, 32 M. C. C. 453 (1942), where it said:

> ". . . It is significant that, with respect to tariffs of common carriers by motor vehicle, Section 217 (a) authorizes us to 'reject any tariff' not in consonance with that section and with regulations issued thereunder, but no such express authority exists with respect to schedules of contract carriers. This is another illustration of the difference in treatment ac-

corded by Congress as between common carriers and contract carriers by motor vehicle" (p. 456).

Earlier in the same opinion the Commission announced the very principle for which appellants are here contending:

> "A contract carrier's minimum rates, unlike common-carrier rates, do not represent a stated price for which a shipper can demand service. **The minimum rates of contract carriers are, in fact, not rates at all in the common-carrier sense of the term. They are simply a floor for the charges actually to be made**" (p. 455). (Emphasis added.)

Certainly it was not the legislative intent to destroy any inherent advantages of contract carriers; indeed, it is declared to be the national transportation policy that all modes of transportation be so regulated "as to recognize and preserve the inherent advantages of each."[16] Among such inherent advantages, as recognized by the Commission (1 M. C. C. 628), is the fact that the charges of such carriers "may be called in question only if they are found to fall below a reasonable minimum level." In a later case, **New England M. Rate Bureau, Inc., v. Lewers and McCauley**, 30 M. C. C. 651 (1941), the Commission quoted the above decision relating to that inherent advantage and went on to say:

> "The Congress intended that the minimum charges prescribed should not discourage the free movement of traffic by contract carriers" (p. 664).

In appellees' motion a number of the Commission's decisions are cited supporting the Commission's interpretation.[17] Conversely, the language in the **Petroleum** case,

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16 54 Stat. L. 899.

17 28 M. C. C. 75, 76; 32 M. C. C. 273, 287; 41 M. C. C. 527, 528; 30 M. C. C. 229, 231; 32 M. C. C. 453.

particularly (32 M. C. C. 453), supports appellants' position. In any event, there is nothing in those cases that can change the basic law from which this dispute stems. To the extent such decisions appear so to do they are clearly erroneous.

Appellees also cite in support of their position an unreported case where the Commission obtained an injunction prohibiting a contract carrier from charging contract rates differing from minimum rates contained in that carrier's published schedule of minimum rates.[18] The decree in that case was a consent decree based on a stipulation of law and fact and there is no indication that the issues presented in the case at bar were considered by that court.

The motion to affirm lends considerable stress to the proposition that appellants are principally concerned with maintaining the "secrecy" of their contract. The motion states that appellants actually desire the privilege of a **pro forma** compliance in the filing of its initial schedule of minimum rates and charges and thereafter be free "to fix minimum rates, to prefer and discriminate in secrecy completely outside the knowledge of its competitors." This, appellants submit, is not so; it is an assumption of fact, not supported by the record in this matter. Moreover, appellees improperly inject such point in the proceeding since they concede the reasonableness of the minimum rates of appellant, Auto Transports, Inc. (R. p. 117).

A transaction between a shipper and a common carrier is subject to a bill of lading contract. Title 49, U. S. C., Secs. 20 (11) and 319. Such a contract is made for each transaction and the rates contained in such contracts must conform to tariff rates—that is, must be no "greater or

[18] Interstate Commerce Commission v. John A. Ralston, Doing Business as Ralston Transport Company, No. 2780, in the District Court of the United States for the Southern District of Ohio, Eastern Division.

less or different" [Section 317 (b)]. On the other hand, when a shipper and a contract carrier agree on a transportation service, the regulations of the Commission impose specific obligations on both parties as to a series of shipments over a period of time (Appendix D). Pursuant to the provisions of Section 320 (a) of the Act and the Commission's regulations (Appendices B and D), the latter contracts are filed with the Commission but the Act provides they shall not be made public except in connection with a formal proceeding where it considers such disclosure as being consistent with the public interest. The proviso to Section 320 (a), however, enables the Commission to make public provisions of any such contracts which "fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 318 (a):" In other words, the standard against which the contract is to be measured are the provisions of Section 318 (a).[19] What is the standard of Section 318 (a) to which a contract must conform? In easily understood language the standard is expressed by the Congress to be—

> "No such carrier shall demand, charge, or collect a **less compensation** for such transportation than the charges filed in accordance with this paragraph . . ." (Emphasis added).

Charges filed in accordance with Section 318 (a) are minimums. It follows then that a contract charge which is no less than the minimum is valid, that is, it conforms[20] to the requirements of the standard of Section 318 (a).

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19 Appellees' description is that "the provisions of Section 218 (a) are paramount and must override the qualified and conditional privilege of secrecy contained in Section 220 (a)" (Motion, p. 10).

20 "Conform" in Section 320 (a) does not mean identical; the quoted language from the statute can leave no other conclusion. The bill of lading contract of a common carrier, on the other nand, is always issued subject to such carrier's published tariffs filed with the Commission; as to the common carrier, then, the bill of lading contract must be identical with the tariffs to conform.

Under such circumstances, Section 320 (a) preserves to the contract carrier and its shipper the privilege of the confidence of the contract filed with the Commission.

Appellees deny that the interpretation given by the Commission would destroy the distinction in rate regulation between common and contract carriers and give the following illustrations which purport to show that the distinction in regulation is preserved under this order: The contract carrier may (1) pick and choose its customers; (2) discriminate between customers; (3) "its charges may be called in question only if they fall below a reasonable minimum level"; (4) contract freely with its customers; (5) negotiate its rates with its customers provided that "the rate actually maintained and charged" be the same as the minimum; and, (6) the contract carrier does not have to "adhere to published rates as is required of common carriers." Examination of the six categories describing distinctions will disclose that only numbers (3) and (6) are actually concerned with rate regulations, and that both of these categories, or distinctions, precisely represent the position of appellants. In categories (4) and (5), i. e., contract carriers may contract freely with their customers and negotiate rates with their customers, so long as they are the same as the minimum, do not stand up if categories (3) and (6) are correct. Of course, a contract carrier may pick and choose its customers as set forth in category (1), but there is some question under the Commission's interpretation that it may discriminate between its customers as alleged in category (2).

These illustrations are not helpful to appellees; rather, they support appellants' position. Nevertheless, it is manifest the Commission's order would, in fact, destroy the distinct classification of common and contract carriers. The Commission cannot require contract carriers to submit to rate regulations similar to that required for com-

mon carriers in the absence of legislation repealing the carefully drawn separate statutory regulations for each class of motor carrier. Compare **Trade Commission v. A. P. W. Paper Co.**, 328 U. S. 193, 202.

(d) The Substantial Question.

In support of the proposition that the case does not contain a substantial question, appellees state that there is no foundation for the contention that the operations of all contract carriers are affected by the Commission's order here under attack. Appellees claim that only the contract carrier with a single shipper would be affected (Rec. p. 107). This, of course, is an admission by appellees that the order here attacked actually creates a subclassification of contract carrier not sanctioned by law. To illustrate, assume that a contract carrier has a contract with three shippers, each of which contracts covers the same commodity. Under the construction of Section 318 (a) insisted upon by appellees one of those shippers would be required to contract for rates exactly the same as the minimum rates contained in the published schedule. As to the other two shippers, the contract carrier could contract for any price in excess of the minimum rate. The latter two shippers and the contract carrier could adjust their rates at will so long as they go no lower than the minimum, and provided further that within twenty days after the effective date of any contract rate adjustment the amended contract is filed with the Commission. The third shipper, however, would not enjoy that freedom of contract but would be required in every instance to submit his contractual arrangement to the administrative procedure and its attendant delays.

Assume, further, two contract carriers serving a shipper with one of such carriers having contracts with several other shippers. The carrier with multiple contracts could

make rate adjustments with its shippers, except one, so long as the adjustments were equal to or higher than the minimum rates contained in the published schedule. The contract carrier serving the single shipper would be unable to adjust his rates except after the completion of the administrative procedure. These illustrations lend emphasis to the incongruity of the construction being placed upon this statute by appellees. In the case of the contract carrier with a single shipper, the delays in contract rate adjustments which would flow from appellees' construction of this statute could have irreparable, if not ruinous, financial results.

Appellees give three examples to illustrate their conception of the practical operation of the Commission's interpretation. First, there is the contract carrier with a single shipper and a single commodity to be transported. Next, is the contract carrier with a single shipper but with three different commodities to be transported. The final illustration concerns a contract carrier with three shippers and three different commodities to be transported. In each example a schedule of minimum rates for each commodity must be filed with the Commission. Of course, in each illustration the contract with the shipper must be filed with the Commission; but appellees wrongfully infer that as to each commodity the contract rate and the minimum rate in the published schedule must be the same. The wrongful inference is continued by appellees when they point out as to each commodity a "contract amendment (which), decreases the minimum rate" on either of the commodities, would require the minimum rate in the schedule to be correspondingly reduced. The basic error in this is that there is no requirement that the contract carrier and its shipper contract as to minimums. But the enlightening fact in these examples is that they disclose the general effect of the construction placed on Section 318 (a) by appellees although earlier they claimed that

there was no substantial question because the order affected only those contract carriers serving a single shipper. Thus, it is plain under appellees' conception of the law the word "minimum" in the statute is meaningless; and, moreover, appellees' examples demonstrate the general importance and substantial nature of the question here presented.

CONCLUSION.

Appellees claim that appellants' fears in respect of delays, particularly the thirty day publication period, are unfounded and that a complete answer is found in the provisions of Section 318 (a) wherein it is provided that the Commission in its discretion, for good cause shown, may allow minimum rates to become effective on less than thirty days' notice. Appellees point to the fact that the Commission's reputation for reasonableness and fairness indicates that it would not so administer Section 318 (a), in exercising its discretion, so as to destroy the flexibility of contract between a contract motor carrier and a shipper. That contention begs the question. Of course, the Commission has an enviable reputation of being fair and reasonable, but basically this controversy presents a question of law and whether or not the Commission is authorized to issue the order here attacked. Appellants claim it is not.

The Commission's order not only disregards the separate and distinct standards of rate regulation as between contract carriers and common carriers, but it goes further in creating a sub-classification of contract carriers not contemplated by the act. The district court did not, as appellees contend, give an entirely adequate and satisfactory answer to these points. The majority opinion in the district court concluded that "the contract rate must be the reasonable minimum schedule rate, or vice versa"

(101 F. Supp., p. 135). The court erred, as a matter of law, when it so concluded. Moreover, the court below has not answered the proposition of different standards of regulation nor has it met the proposition of sub-classification of contract carriers.

Every statute should be construed, if at all possible, to preserve its constitutionality. **United States v. Powers,** 307 U. S. 214, 217. Appellants maintain that Section 318 (a) may be so construed; however, if the district court has correctly construed this statute, then the statute, in the circumstances, is unconstitutional since it vitiates the very basis of due process of law. Amendment 5, Constitution of the United States. The district court and appellees herein have not answered appellants' arguments on the constitutional question; the court below erred when it upheld the Commission's interpretation of the statute and then failed to rule on the constitutional question which was before it.

On the question of interpretation, **United States v. Sullivan,** 332 U. S. 689, is apposite. There the Court said at pages 693-4:

> "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity. Although criminal statutes must be

> so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see **Kraus & Bros., Inc., v. United States**, 327 U. S. 614, 621-622, even in determining whether such statutes meet that test, they should be given their fair meaning in accord with the evident intent of Congress. **United States v. Raynor**, 302 U. S. 540, 552."

The Interstate Commerce Act is a remedial statute and should be liberally construed in order that its purposes be carried out. The Interstate Commerce Commission has the duty of carrying out these purposes. In fact, the national transportation policy of the Congress specifically admonishes the Commission to administer and enforce the Act with the view of carrying out the policy announced, to-wit: "to provide for fair and impartial regulation of all modes of transportation." The manifest intent of Congress in the Interstate Commerce Act is clear and that the arrangement in respect of transportation between appellants meets all the tests of the statute is plain. This was emphatically stressed by Judge Vaught in his dissenting opinion in the court below. Judge Vaught summarized the situation in the following succinct manner:

> "In summing up the situation, therefore, it is apparent that the first requirement by Congress was that the plaintiff should obtain a permit, which it did; second, that it should establish and observe reasonable minimum rates and charges, which it did; third, that it should file with the Commission, publish and keep open for public inspection a schedule of minimum rates and charges, which it did; and, fourth, that it file with the Commission its contract with its shipper in order that the Commission might know the rates which the plaintiff was, in fact, charging, which contract was not open to public inspection, and this the plaintiff did."

The question here is substantial for it affects not only appellants, but every other contract carrier and its shipper whose operations are subject to Part II of the Interstate Commerce Act. Although its opinions are entitled to respect here, a basic error of law has been committed by the Interstate Commerce Commission, which would be perpetuated by the district court. The position of the Commission in this case is not compatible with its own rules (Appendices C and D) nor with its expressed opinion in other matters hereinabove cited. There certainly is no settled interpretation here even as to the Commission itself. Compare **United States v. Mo. Pac. R. Co.**, 278 U. S. 269, 281; **Order of Conductors v. Swan**, 329 U. S. 520, 525. It is imperative, therefore, that the matter be decided by the United States Supreme Court.

The motion to affirm should be denied.

Respectfully submitted,

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APPENDIX A.

Section 318 (a). **Schedules of Contract Carriers by Motor Vehicle:**

"It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this chapter. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such sched-

ules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: **Provided**, That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act."

APPENDIX B.

Section 320 (a). **Accounts, Records and Reports—(a) Reports to Commission; copies of contracts; publication of information.**

"The Commission is authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers, and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker or lessor in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: **Provided**, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 318 (a) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof."

APPENDIX C.

CODE OF FEDERAL REGULATIONS.

(1949 Edition.)

Title 49—Transportation.

Part 187—Freight Rate Tariffs, Schedules, and Classifications.

Contract Carrier Schedules.

"Section 187.0. **Schedules defined.**

* * * * * * * *

"(b) The term 'schedule' means a publication stating the minimum rates and charges of a contract carrier, and all rules which it applies in connection therewith."

* * * * * * * *

"Section 187.8. **Form and contents of schedules.**

* * * * * * * *

"(b) **Required notice.** Unless otherwise authorized by the Commission, all schedules of minimum rates or charges and supplements thereto shall be filed and posted at least 30 days prior to the effective date thereof.

* * * * * * * *

"(p) **Tables of minimum rates or charges.** (1) The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged.

* * * * * * * *

"(r) **Schedules covering new services.**

* * * * * * * *

"(2) The actual or proposed contract or amendment to a contract, filed in accordance with the provisions of this paragraph, shall show the actual rates and charges for the services to be performed thereunder."

(Part 187 provides separate regulations for Common Carrier Freight Tariffs and Classifications.)

APPENDIX D.

CODE OF FEDERAL REGULATIONS.

(1949 Edition.)

Title 49—Transportation.

Part 173—Contracts for Transportation of Property.

"Sec. 173.1—**Filing of Contracts for transportation of property.**

"(a) All contract carriers of property by motor vehicle, as defined in Section 203 (a) (15) of Part II of the Interstate Commerce Act, shall on or before July 15, 1937, file with the Commission at its office in Washington, D. C., a true copy of each and every contract for transportation of property existing and in force on said date, and within 20 days after the date any subsequent contract for transportation of property is entered into a true copy thereof, all of which shall contain the charges of such contract carriers for the transportation of property in interstate or foreign commerce, and any rule, regulation, or practice affecting such charges and the value of the services thereunder."

"Sec. 173.2—**Contracts or agreements to be in writing.**

"(a) All contract carriers by motor vehicle, as defined in Section 203 (a) (15) of the said Act, shall cease and desist on or before July 1, 1937, from transporting property for hire in interstate or foreign commerce except under special and individual contracts or agreements which shall be in writing, shall provide for transportation for a particular shipper or shippers, shall be bilateral and impose specific obligations upon both carrier and shipper

or shippers, shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which contracts or agreements shall be preserved by the carriers parties thereto so long as such contracts or agreements [are] in force and for at least one year thereafter."

[Note—A modification of this rule, effective December 17, 1951, is of no consequence here (16 F. R. 11605).]

APPENDIX E.

Sec. 318 (b)—Complaints and Investigations; hearings and orders of the Commission.

"Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy, declared in the Interstate Commerce Act, or is in contravention of any provision of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this chapter, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath."

APPENDIX F.

82d Congress

2d Session

S. 2752

IN THE SENATE OF THE UNITED STATES.

February 27 (legislative day, February 25), 1952.

Mr. Bricker (for himself, Mr. O'Conor, and Mr. Capehart) introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce.

A BILL

To require the establishment of actual rates by contract carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 218 of the Interstate Commerce Act, as amended is hereby amended by—

(a) inserting the words "just and" before the word "reasonable" where it first appears in the first sentence of the subsection;

(b) striking the word "minimum" wherever it appears in the subsection;

(c) striking the word "reduction" from the fourth sentence of the subsection and inserting in lieu thereof the word "change"; and

(d) inserting the words "more or" before the word "less" wherever it appears in the sixth sentence of the subsection.

Sec. 2. Subsection (b) of section 218 of the Interstate Commerce Act, as amended, is hereby amended to read as follows:

"(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection herewith, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable rate or charge, or maximum and minimum or maximum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such contract carrier in competition with any common carrier subject to this Act, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such contract carriers, and to the effect of such rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such contract carriers, and by other carriers subject to this Act. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath."

MAY 9 1952

Supreme Court of the United States

OCTOBER TERM, 1951

No. 68

ALLEGHENY AIRLINES, INC., and
GENERAL MOTORS CORPORATION,
Appellants,
vs.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

PETITION FOR REHEARING

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In The

Supreme Court of the United States

OCTOBER TERM, 1951

No. 665

AUTO TRANSPORTS, INC., and
GENERAL MOTORS CORPORATION,
Appellants,
vs.
UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees

PETITION FOR REHEARING

Appellants, petitioners herein, are much aggrieved by the *per curiam* order of the Court entered in this cause April 21, 1952, granting Appellees motion to affirm, and respectfully petition the Court for rehearing in the sincere belief that, in equity and justice, they are entitled to the relief sought in this petition.

Petitioners realize that this Court is confronted with numerous petitions for rehearing by unsuccessful litigants, but the importance of the question here involved both to the contract carrier section of the entire motor

carrier industry and the innumerable shippers throughout the nation using the services of such carriers, including appellants, compels us to file this petition for rehearing which we earnestly urge the Court to grant.

Petitioners urge that it is the duty of, and within the province of, this Court to review its action in this case which review we feel is imperative for the following reasons:

(1) Because of the conflict between the decision in this case and a prior decision of this Court; and,

(2) Because of the substantial nature of the question* involved demonstrated by the manifestation of interest by contract carriers indicating the nationwide effect of the *per curiam* order.

THE FIRST REASON FOR REHEARING—
PRESENT CONFLICT IN DECISIONS OF THIS COURT

In the case of *Betterman v. American Stores,* 80 A. 2d 66, certiorari denied by this Court October 8, 1951, Case No. 190, 96 L. Ed. 32, the question presented was whether a contract carrier could legally collect from its shipper charges in excess of the rates and charges contained in its minimum rate schedule filed with the Interstate Commerce Commission, under the requirements of Section

*The question presented is—"Whether Title 49, U. S. C., Section 318(a), requires appellant, Auto Transports, Inc., to file with the Interstate Commerce Commission as a schedule of minimum rates or charges the actual contract charges contained in its current contract with appellant, General Motors Corporation, which contract is required to be filed with the Interstate Commerce Commission under the provisions of Title 49, U. S. C., Section 320(a)." (Brief of Appellants in Opposition to Motion to Affirm, p. 3.)

318(a), and a similar schedule filed with the Pennsylvania Public Utility Commission. The Pennsylvania Supreme Court held that the contract carrier could charge and collect from the shipper charges higher than the rates set forth in its schedule of minimum rates and charges on file with both the State Commission and the Interstate Commerce Commission. The Supreme Court of Pennsylvania held (at page 72):

> "Defendant makes the same legal contention with respect to the rates filed with the Interstate Commerce Commission that it made with respect to those filed with the Public Utility Commission of Pennsylvania, namely, that *they were the only charges or rates which could legally be collected.* Regardless of any technical violation by plaintiff of the Interstate Commerce Act, the present suit of the plaintiff does not violate the public policy expressed by said act since plaintiff is making *no attempt to collect less than the minimum rates* on file with the Commission, but rather to collect the *additional compensation guaranteed by his 1937 contract* with this defendant and impliedly referred to in their 1939 contract." (Emphasis added.)

That decision remains extant by reason of the denial of certiorari by this Court on October 8, 1951.

The *per curiam* decision herein affirms an exact opposite interpretation of Section 318(a). The interpretation affirmed* is couched in the following rather equivocal language:

> "It is true that the Commission's order has the effect of construing Section 318 (a) to require a contract carrier to file and publish a schedule of rates and charges which it actually maintains and

*Auto Transports v. United States, 101 F. Supp. 132.

> charges any one shippe nd since Auto has a contract under its permit with only one shipper, *the order has the rather anomalous effect of requiring it to actually charge that shipper the rates filed and published in its schedule.* In other words, the contract rate must be the reasonable minimum scheduled rate or vice versa." (Emphasis added.) (p. 134).

So, under the rule of the *Betterman* case a contract carrier may charge and collect from its shipper rates and charges in excess of the schedule of minimum rates and charges filed with the Commission; in the instant case the rule is that the contract rate charged must be the minimum rate on file with the Commission, a rule in total conflict with the former rule.

Thus, a conflict in the decisions of this Court now exists.

THE SECOND REASON FOR REHEARING— THE SUBSTANTIAL QUESTION DEMONSTRATED BY—

(a) Manifestation of Interest

Since the *per curiam* order a number of other interests have manifested concern with the impact of the Court's order. This manifestation of interest further persuades petitioners to seek rehearing. These interests* have advised petitioners that they will undertake to file an

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*Contract Carrier Conference, American Trucking Associations, Inc., Washington, D. C.
Anchor Motor Freight, Inc., of Delaware, Cleveland, Ohio.
Anchor Motor Freight, Inc., of Michigan, Flint, Michigan.
Anchor Motor Freight, N. Y. Corp., Tarrytown, New York.
W. R. Arthur & Co., Inc., Janesville, Wisconsin.
Complete Auto Transit, Inc., Detroit, Michigan.
Jack Cooper Transport Company, Inc., Kansas City, Missouri.

amicus curiae brief with this Court setting forth their respective positions. At this time petitioners are unable to say that appellees will consent to the filing of such briefs, but petitioners have been assured that failing to obtain consents from appellees, petitions will be filed with this Court by such parties for permission to file such briefs in support of petitioners' position.

(b) Nationwide Importance of the Question Here Involved and Resultant Effects of Decision.

The *per curiam* order in this case affects all of the contract motor carriers operating throughout the United States and all their present and future shippers.

Petitioners believe that the *per curiam* order results from the principal contention in the motion to affirm, namely, that the appeal presents no substantial question. Petitioners undertook to show in their brief in opposition to the motion to affirm that, notwithstanding the contention of appellees, the question presented was substantial and, in fact, its substantiality could even be recognized from the arguments of appellees.

We are advised by members of the staff of the Interstate Commerce Commission that there are approximately 3,000 contract carriers by motor vehicle subject to the Commission's jurisdiction. This litigation affects the administration of the Act as it applies to all of these contract carriers. This is apparent from appllees' motion to affirm, a careful analysis of which is contained in petitioners' brief in opposition to the motion to affirm (pp. 24-26).

The implications of the case are tremendous. If the *per curiam* order is allowed to stand, contract carriers

will be required to observe the same regulation with respect to rates to be charged for transportation services as apply to common carriers by motor vehicle, notwithstanding the fact that under the statute separate and wholly different types of regulation are in effect.

The remainder of this section is illustrative. A contract carrier by motor vehicle is a creature of statute; under common law the nomenclature employed to describe such a carrier was "private carrier." The contractual arrangements between petitioners are of a private nature, and this is recognized by the Act. (Sec. 320(a)). They have entered into a contract under which the transportation service is performed and the carrier-petitioner performs an exclusive transportation service of the same character as if the service were performed by vehicles and employees of the shipper-petitioner. The regulations* of the Interstate Commerce Commission permit adjustments in the contract rates above the minimum rates filed with the Commission without resort to any administrative procedure, so long as modifications of the contract are filed with the Commission within 20 days after they become effective. *This regulation of the Commission would become a nullity under the per curiam order. The freedom to contract between petitioners would come to an end under the same order.*

The carrier-petitioner herein, Auto Transports, Inc., serves the shipper-petitioner General Motors Corporation exclusively in the delivery of new automobiles from a plant at Kansas City, Kansas.

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*Code of Federal Regulations, Title 49, Secs. 173.1-173.6. See Appendix D of Brief of Appellants in Opposition to Motion to Affirm.

Carrier-petitioner has no other source of income.

Shipper-petitioner has no other available means for the delivery of automobiles by motor carrier.

In the circumstances, the flexibility of the contractual relation between the petitioners is vital to their respective operations.

For example, carrier-petitioner may require increases in rates as a result of increased costs of operation in the performance of its contract. With the regulations of the Commission as now interpreted under the *per curiam* order, the shipper-petitioner cannot agree immediately to a rate compensating the carrier for the increased costs.

On the other hand, if for any reason a decrease in the transportation charges is warranted, such as may be the case in a general lowering of costs or in the case of an increased volume of traffic, it would be impossible for the shipper-petitioner to realize such lowered costs in the contractual arrangements without submitting the modification of the contract to the Commission, subject to a procedure which may involve the suspension of the reduced rate for a period of not more than 7 months,* and, with the additional possibility of said reduction being declared unreasonable by the administrative body. Petitioners strongly contend that the Interstate Commerce Act should not be interpreted to put a shipper and its contract carrier in the throes of economic uncertainty.

Conversely, a common carrier has many sources of revenue and shippers who rely upon common carriers ordinarily have a choice of such agencies for transportation service.

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*Procedure in Sec. 313(a). See Code of Fed. Reg., Sec. 187.8(b), (Appendix C in Brief of Appellants in Opposition to Motion to Affirm.)

(c) Purpose of Regulation of Contract Carriers

Apparently the principal purpose of the Congress in regulating contract carriers by motor vehicle was to enable the Commission through its investigative authority to protect common carriers. To illustrate, Section 318(b) of the Act* contains the following sentence:

> "Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such (contract) carrier in competition with any common carrier by motor vehicle subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy * * *"(Interpolation supplied.)

It is clear that this duty of the Commission in connection with the protection of common carriers is concerned only with minimum rates and not contract rates. In a report dealing with this section of the statute the Commission in *Contracts of Contract Carriers,* 1 MCC 628, made the following significant statement:

> "* * * The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. For that reason it differs from the common-carrier regulation.
>
> Thus, we are authorized to prescribe minimum charges for contract carriers, but not maximum

*Quoted in full at Appendix E of Brief of Appellants in Opposition to Motion to Affirm.

> charges. No need exists, as to such carriers, for protecting the public against exorbitant charges, because the contracting shippers are well able to protect their own interests in this respect. The patent object of Congress is to protect the common carriers against cut-throat competition. This appears explicitly in section 218 (b) which enjoins us, in prescribing minimum charges for contract carriers, to 'give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part.'"

We hasten to inform the Court that the Commission, in more recent reports, has held that a contract carrier minimum rate is not unlawful even if it be lower than the comparable rate of a common carrier. *Roofing from Elizabeth, New Jersey, to Norwood, Massachusetts,* 51 MCC 258, 261 (1950); and compare *New England M. Rate Bureau, Inc., v. Lewers and McCauley,* 30 MCC 651, 663, 664 (1941). In the latter case the Commission said "that the Congress intended that the minimum charges prescribed should not discourage the free movement of traffic by contract carriers."

There has been no question raised with respect to the reasonableness of the minimum rates of Auto Transports, Inc., but, importantly, insofar as the Commission is concerned, its authority extends only to the regulation of the minimum rate and for the purpose stated in the statute, as the Commission itself recognizes maximum rates of contract carriers are within the sphere of control of the contracting shipper.

In *New Automobiles in Interstate Commerce,* 259 ICC 475, 536 (1945), the Commission after an exhaustive study, and five years after the amendment of Section 318(a)

which is here in controversy, made the following significant statement relative to minimum rates of contract carriers:

> "• • • we were given the power to fix minimum rates 'primarily for the purpose of preventing destructive competition in rates and promoting the financial stability of the transportation agencies.' • • •"

By these tests the *per curiam* order of April 21, 1952, is in error.

(d) Statutory Classification of Motor Carriers Destroyed.

Since the inception of the regulation of motor carriers under Federal legislation, there has been no departure from the clear delineation always heretofore maintained as between regulation as it applies to common carriers by motor vehicle, on the one hand, and contract carriers by motor vehicle, on the other. The manifest intent of the Congress has been to maintain these separate standards of regulation. The order of the Interstate Commerce Commission, which has been affirmed by this Court, is the first deviation from this important legislative distinction. Such deviation by administrative fiat or judicial interpretation is improper. *Miller v. United States,* 294 U. S. 435, 440; *Arizona Grocery v. Atchison Ry.,* 284 U. S. 370, 387.

In order to bring into clearer focus the divergent statutory requirements on this point, the language employed by the Congress to govern the published rates of these respective classes of motor carriers is important. As to common carriers, Section 317(b) contains the following language:

> "No common carrier by motor vehicle shall charge or demand or collect or receive a *greater or less or different* compensation for transportation * * * than the rates * * * specified in the tariffs in effect at the time; * * *" (Emphasis added.)

The comparable portion of Section 318(a) pertaining to the rate requirements of contract carriers is couched in the following language:

> "No such carrier shall demand, charge, or collect a *less compensation* for such transportation than the charges filed in accordance with this paragraph * * * and it shall be unlawful for any such carrier * * * to charge, accept or receive *less than the minimum charges so filed* * * *" (Emphasis added.)

Thus, the fixed price required for common carrier service is materially different from "reasonable" minimums as to contract carrier service. Under the fixed price interpretation of the Commission, as herein applied, or as may be stated otherwise, the maximum and minimum single rate, petitioner, Auto Transports, Inc., would, in effect, be required to follow, in the matter of rates and charges, the same practices required by law of common carriers, to-wit: the publication of *exact* rates rather than *minimum* rates. Such an interpretation completely disregards the different standards which Congress has established for the regulation of the two classes of carriers and fails to recognize the inherent advantages of the contract carrier.

The rate section of the act as it applies to common carriers and the rate section as it applies to contract carriers, both of which are hereinabove set forth to the extent that they are important herein, when reviewed in connection with the Commission's order sustained by the *per curiam*

order herein, leads to no other conclusion but that such order is directly contrary to the clear expressions of these sections.

Section 304(b) of the Act contains the authority for the Commission to establish classifications of carriers but only "as the special nature of services require". This authority has been exercised by the Commission. *Classification of Motor Carriers*, 2 MCC 703. The *per curiam* order. in this case, actually creates a subclassification of carriers not contemplated by this section of the Act.*

CONCLUSION

Under the provisions of Section 320(a) of the Act petitioners have a right to the privacy of their contractual arrangements except in instances, not important here, which allows the Commission to make a disclosure of such contracts. Petitioners are strongly of the opinion that shippers and contract carriers are entitled to the protection of that section. However, this is neither the purpose of this litigation nor a legal issue in this matter. Appellees incorrectly state in their motion to affirm that petitioners wish to "prefer and discriminate in secrecy completely outside the knowledge" of competitors. There is neither factual nor legal basis for that statement.

Petitioners in this litigation merely desire to preserve the flexibility in their contractual arrangements which they believe is guaranteed to them by the statute. Reasons for the necessity of such flexibility have already been set forth hereinabove.

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*See pp. 24-27 Brief of Appellants in Opposition to Motion to Affirm.

Petitioners respectfully submit that the *per curiam* order is in error as a matter of law because it affirms a decision of the court below, sustaining an order of the Interstate Commerce Commission, which cuts through the statutory distinctions between common carriers and contract carriers. Moreover, an important result of the *per curiam* order will require every rate agreement between petitioners to be published subject to the administrative procedure provided for in Part II of the Interstate Commerce Act and with all the attendant delays in connection therewith.

A contract, such as is here involved, contemplates the purchase and sale of transportation, and, because of the private nature of the transaction, is hardly any different than the purchase of livestock by a farmer. A rancher would be in quite a dilemma if in the buying and selling of cattle he were required to enter into transactions whereby necessary delays in the determination of a price, agreed to by the buyer and the seller, depended upon the action of some administrative body.

The regulatory scheme as it applies to contract carriers by motor vehicle is, because of this *per curiam* order and the order in the *Betterman* case, *supra*, in a state of confusion. This confusion has been intensified by the introduction in the United States Senate of a bill* designed to accomplish by an amendment to Section 318(a) what the Commission has accomplished here by interpretation. The proposed legislation discloses that the legislative interpretation of this statute does not conform to the interpretation which heretofore has been given in this proceeding.

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*S. 2752. See pages 12 and 13 of the Brief of Appellants in Opposition to Motion to Affirm and Appendix F thereto.

WHEREFORE, premises considered, petitioners respectfully request the Court to rehear the motion to affirm and assume jurisdiction in order that petitioners may fully demonstrate to the Court the error of the Court below in affirming the order of the Interstate Commerce Commission involved in this case, and postpone issuance of mandate.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and in accordance with the requirements of Rule 33 of the rules of this Court.

Walter R. Frizzell,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for rehearing has this day been served upon counsel for the adverse parties.

Walter R. Frizzell,
Counsel for Petitioners.

Dated at Detroit, Michigan,
May 8, 1952.

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In The

Supreme Court of the United States

OCTOBER TERM, 1951

No. 665

AUTO TRANSPORTS, INC., and
GENERAL MOTORS CORPORATION,
Appellants,

vs.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Come now Anchor Motor Freight, Inc., of Delaware, Cleveland, Ohio; Anchor Motor Freight, Inc., of Michigan, Flint, Michigan; Anchor Motor Freight, N. Y. Corp., Tarrytown, New York; Complete Auto Transit, Inc., Detroit, Michigan; and Jack Cooper Transport Company, Inc., Kansas City, Missouri, by Edmund M. Brady, their counsel, and W. R. Arthur & Co., Inc., Janesville, Wisconsin, by Glenn W. Stephens, its counsel, and hereby respectfully request the Court to permit said parties to jointly file a brief as *amicus curiae* in support of the petition of appellants, Auto Transports, Inc., *et al.*, for a rehearing in the above-entitled action.

Applicants represent to the Court that each of them are contract carriers and as such operate under permits issued by the Intertsate Commerce Commission under the provisions of Section 309, U. S. C., Title 49. Each of said applicants has filed with the Interstate Commerce Commission their respective schedules of minimum rates and charges as required under the provisions of Section 318(a), U. S. C., Title 49, and copies of their respective contracts* as required by Section 320(a), U. S. C., Title 49. Said applicants, therefore, have a direct and positive interest in this case as each of them is subject to the provisions of the Interstate Commerce Act and the Commission's Rules and Regulations issued pursuant to said Act. The decision of the Court below** (divided as it was) and the action of this Court in granting appellees' motion to affirm adversely and most seriously affects their respective businesses and operations.

The failure of applicants to make an earlier appearance in this case was occasioned by the fact that the order to show cause issued by the Interstate Commerce Commission herein, and which precipitated this litigation, was issued solely against appellant, Auto Transports, Inc. Moreover, at the time appellants herein brought their appeal, this Court already had denied review of the very question here in litigation. (See *Betterman v. American Stores,* 80 A. 2d 66, 367 Pa. 193, certiorari denied by this Court October 8, 1951, Case No. 190, 96 L. Ed. 32.) In that case the Supreme Court of the State of Pennsylvania decided, by unanimous decision, that under both the Federal statute (Section 318(a) of the Interstate Commerce Act) and the Pennsylvania statute, contract carriers are not bound to

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*The contracting shipper, in each case, is a Division of General Motors Corporation.

***Auto Transports, Inc., v. United States* (101 F. Supp. 132).

charge shippers minimum rates filed by them with the regulatory bodies but may charge contract rates in excess of such minimums. Relying on the action of the Supreme Court in the *Betterman* case, *supra*, applicants considered the matter *res adjudicata*. That situation is now confused by the action of this Court in granting appellees' motion to affirm in this case. The decisions in the two cases are contradictory and diametrically opposed.

Applicants have with due diligence endeavored to obtain the consent of the appellees in this cause (pursuant to the provisions of Rule 27 of the Rules of this Court) to permit them to file a brief as *amicus curiae* in support of the petition for rehearing. That consent has not been forthcoming, hence this motion.

Applicants have had an opportunity to read, study and check the petition of appellants wherein they request this Court to grant rehearing in this cause. Such review of the petition by appellants discloses that the same does not adequately present the issues which they deem necessary and relevant to the proper disposition of this case by this Court. For example, appellants cannot show the impact which the conflicting decisions of this Court, in this case and in the *Betterman* case, will have upon their respective operations nor have they adequately presented the legal arguments pertaining to that matter.

In addition to the foregoing we respectfully submit that the action of the Interstate Commerce Commission herein complained of is illegal and void for the reason that such action is in violation of the provisions of Section 1 of Article I and the Fifth Amendment of the Constitution of the United States.

Therefore, if the situation is permitted to remain in *status quo*, only confusion and irreparable injury and dam-

age will result. Unless this Court grants appellants' petition for rehearing in this cause contract carriers can only attempt to avoid irreparable injury and damage by further litigation involving the same subject matter. Accordingly, we respectfully submit that the foregoing requires that this Court resolve the situation and that applicants be afforded the opportunity of presenting to this Court the reasons why the action of this Court in granting appellees' motion to affirm the decision of the Court below will adversely affect their respective businesses and operations.

Wherefore, applicants request that an order be entered by this Court permitting their joint filing of a single brief as *amicus curiae*, supporting appellants' petition for rehearing, to which end they respectfully pray.

Respectfully submitted,

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Complete Auto Transit, Inc., of Detroit, Michigan;
Anchor Motor Freight, Inc., of Delaware, of Cleveland, Ohio;
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STEPHENS, CANNON, BIEBERSTEIN
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Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been served upon all parties to this case by forwarding a copy of the same to each party, via United States mail, postage fully prepaid.

EDMUND M. BRADY

Dated: Detroit, Michigan
May 12, 1952.

Office - Supreme Court, U.
FILED
MAY 13 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 665

AUTO TRANSPORTS, INC., and GENERAL MOTORS CORPORATION,
Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

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May 12, 1952

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 665

AUTO TRANSPORTS, INC., and GENERAL MOTORS CORPORATION,
Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

This is the motion of the Contract Carrier Conference of the American Trucking Associations, Inc., hereinafter referred to as Movant, for leave to file a brief amicus curiae pursuant to Rule 27 9(c) of the Revised Rules of the Supreme Court of the United States. Movant is a trade association representing the collective interests of some three thousand motor carriers engaged in transporting property in interstate commerce as contract carriers pursuant to permits issued by the Interstate Commerce Commission.

The instant case raises an issue in which all interstate contract motor carriers have a vital interest, namely,

whether the provisions of Title 49 U. S. C. Section 318 (a) requires contract motor carriers to file actual charges with the Interstate Commerce Commission or reasonable minimum charges. Not only are the regulatory aspects of this question of interest to contract carriers, but the effect which a decision on this question will have on their contractual relationships with their shippers is of paramount importance.

The appellant in the instant case, Auto Transports, Inc., is a contract motor carrier of automobiles having but a single contract. The case has been presented to the Court solely on this factual basis. The decision of the Court will affect not only those transporting automobiles under a single contract but will affect those transporting other commodities and those performing services under more than one contract. A number of contract carriers transport property under an agreement which provides a basic rate which is the minimum, but in addition provides that the carrier is entitled to additional amounts under certain circumstances to assure a reasonable profit for services performed. This factual situation has not been called to the Court's attention. A decision on the issue before the Court will either validate or invalidate these contracts to the extent that they provide for compensation in addition to the basic rate.

In *Betterman* v. *American Stores,* 80 A. 2d 66, certiorari denied by this Court October 8, 1951, Case No. 190, 96 L. Ed. 32, it was decided that Betterman, a contract carrier, with one contract, could legally recover sums in addition to its basic rate in accordance with the terms of its contract with American Stores. If the decision of the Court in the instant case stands it is doubtful whether a contract carrier may legally collect anything in addition to the basic rate filed with the Commission. Furthermore, the decision in the instant case certainly gives shippers who have paid over and above the basic rate a grounds for recovering back such payments.

The above facts and legal effect of the Court's decision have not and will not be presented by appellant because they are of no importance to it.

The entire presentation of this case to the Court would indicate that the issue to be decided is of interest only to those contract carriers operating under a single contract. This is not the true fact. Many contract carriers with two or more contracts provide different services for each shipper served. The Interstate Commerce Commission requires that rates be filed for each separate service. If the decision of the Court in the instant case stands these carriers will be required to file their actual rates with the Commission and will be precluded from making additional charges even though the decision in the *Betterman* case, *supra*, appears to give them this right. These facts will not be presented to the Court because they have no application to appellant.

Counsel for Movant attempted to gain the consent of the United States of America to the filing of a brief amicus curiae in support of appellant's petition for rehearing and was unsuccessful.

WHEREFORE, Movant respectfully moves that the Court grant leave to file a brief amicus curiae in support of appellant's petition for rehearing.

Respectfully submitted,

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Washington, D. C.,
Counsel for Movant
Contract Carrier Conference,
American Trucking
Associations, Inc.

TODD, DILLON & CURTISS
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May 12, 1952

No. 665. AUTO TRANSPORTS, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *James W. Wrape, Glenn M. Elliott* and *L. Karlton Mosteller* for Auto Transports, Inc.; and *Henry M. Hogan* and *Walter R. Frizzell* for General Motors Corporation, appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 101 F. Supp. 132.